No. 92-1550-CFX
Status: GRANTED

Title: ABF Freight System, Inc., Petitioner
v.
National Labor Relations Board

Docketed:
March 24, 1993

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Jansonius,John Victor

Counsel for respondent: Solicitor General, Kennedy,Joseph P.

Entry	Date	Note	Proceedings and Orders
1	Mar 24 1993	G	Petition for writ of certiorari filed.
3	Apr 22 1993		Order extending time to file response to petition until May 26, 1993.
4	May 26 1993		DISTRIBUTED. June 11, 1993
5	May 26 1993	X	Brief of respondent National Labor Relations Board in opposition filed.
6	Jun 14 1993		Petition GRANTED. limited to Question 3 presented by the petition.
			**********
8	Jul 15 1993		Order extending time to file brief of petitioner on the merits until August 12, 1993.
9	Aug 11 1993		Record filed.
		*	Original proceedings U. S. Court of Appeals - Tenth Circuit and National Labor Relations Board (1 BOX)
10	Aug 12 1993		Brief amicus curiae of American Trucking Associations filed.
11	Aug 12 1993		Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
12	Aug 12 1993		Joint appendix filed.
13	Aug 12 1993		Brief of petitioner ABF Freight System, Inc. filed.
15	Sep 10 1993		Order extending time to file brief of respondent on the merits until September 29, 1993.
16	Sep 29 1993		Brief amici curiae of Lawyer's Committee for Civil Rights Under Law, et al. filed.
17	Sep 29 1993		Brief of respondent National Labor Relations Board filed.
18	Sep 29 1993		Brief amicus curiae of AFL-CIO filed.
19	Oct 6 1993		CIRCULATED.
20	Oct 14 1993		SET FOR ARGUMENT WEDNESDAY, DECEMBER 1, 1993.(2ND CASE).
21	Oct 19 1993	G	Application (A93-341) extension of time to file reply brief on the merits from November 3, 1993 to November 17, 1993, submitted to Justice Ginsburg.
22	Oct 21 1993		Application (A93-341) granted by Justice Ginsburg extending the time to file until November 17, 1993.
23	Nov 17 1993	X	Reply brief of petitioner filed.
24	Dec 1 1993		ARGUED.

No. 92-1550

IN THE

Supreme Court of the United States

October Term, 1992

ABF FREIGHT SYSTEM, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(2916—LC9-390—1993)

QUESTIONS PRESENTED

1. Does section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), prohibit the NLRB from ordering reinstatement of an employee who was discharged for just cause under the applicable collective bargaining agreement?

2. Can the NLRB set aside findings of fact made in final and binding grievance arbitration under a collective bargaining agreement?

3. Does an employee forfeit the remedy of reinstatement with backpay after the Administrative Law Judge finds that he purposefully testified falsely during the administrative hearing?

PARTIES TO THE PROCEEDING

(Rule 28.1 Statement)

ABF Freight System, Inc. is a wholly owned subsidiary of Arkansas Best Corporation. ABF Freight System, Inc. has one subsidiary by the name of ABF Freight System (BC), Ltd. Respondent is the National Labor Relations Board, an agency of the United States government. Michael Manso is an individual who ABF Freight System, Inc. has been ordered to reinstate to employment in Albuquerque, New Mexico.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

ABF FREIGHT SYSTEM, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit has been reported at 982 F.2d 441 (10th Cir. 1993) and is included in the Appendix for Petitioner submitted herein, beginning at page A-1. The Decision and Order of the

National Labor Relations Board and the Administrative Law Judge's Decision have been reported at 304 NLRB No. 75 (1991) and are included in the Appendix beginning on page B-1.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1992 (Appendix A-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals for the Tenth Circuit had jurisdiction over the National Labor Relations Board's Final Order pursuant to 29 U.S.C. § 160(f) (1988).

STATUTORY PROVISIONS INVOLVED

Section 10(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(c) 1988 provides:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

NLRA § 203(d), 29 U.S.C. § 173(d) (1988) speaks to the preferred means for determining cause for discharge and other issues of labor contract interpretation. That statutory provision states:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement or interpretation of an existing collective bargaining agreement.

The text of all statutory provisions referred to in this Petition are included in the Appendix beginning on page C-1.

STATEMENT OF THE CASE

The Tenth Circuit Court of Appeals' decision involves important federal questions over which there is a clear split in published decisions by the federal circuit courts of appeals. The first question goes to the meaning of the clause in NLRA § 10(c), 29 U.S.C. § 160(c) (1988) prohibiting the National Labor Relations Board (the "Board") from awarding reinstatement and backpay to an employee who was discharged for cause. Specifically, can the Board order reinstatement and backpay to an employee even though it has been determined in final and binding grievance arbitration that the employee was discharged for cause in accordance with the applicable collective bargaining agreement? A corallary question directly raised by the Tenth Circuit's ruling is whether the Board can set aside findings of fact made in final and binding grievance arbitration under a labor contract.

The second issue goes to the integrity of the NLRA and its adjudicatory system. Can an employee who lies to his employer and then repeats his lie to an administrative law judge, during a formal NLRB proceeding, be reinstated to his job and awarded backpay? Within the last 10 months, the

Eight Circuit has said "no" and the Tenth Circuit has said "yes." In this case, the Tenth Circuit has condoned perjured testimony in an NLRB hearing by rewarding the perjuror with reinstatement and back pay.

The facts pertinent to this Petition For a Writ of Certiorari are not in dispute. ABF Freight System, Inc. ("ABF") is an interstate trucking company with freight terminals in several cities, including Albuquerque, New Mexico. Dock workers at the Albuquerque terminal are represented by Local 492 of the International Brotherhood of Teamsters, Warehousemen & Helpers of America ("Local 492"). Wages, hours, terms and conditions of employment for ABF's dock workers in Albuquerque are set out in national and regional labor contracts respectively known as the National Master Freight Agreement ("NMFA") and Western States Area Supplemental Agreement ("WSA").

Michael Manso was hired as a casual dock worker at the Albuquerque terminal in April 1987. As an ABF employee, Mr. Manso was represented by Local 492 and was covered by the NMFA and WSA. Article 46, section 1 of the WSA provides that covered employees can only be terminated with "just cause." One warning notice for an offense is required before termination may be imposed, except for certain serious offenses, such as dishonesty, which can result in immediate discharge.

The specific events material to this Petition began in the Spring of 1989. On June 19 that year, Mr. Manso was discharged from employment after two incidents of failure to protect start time. For a casual like Mr. Manso, failure to protect start time means he was unavailable for work at a time when he was subject to being called by ABF.

Mr. Manso grieved his June 19 termination and explained at the hearing, for the first time, that his telephone was not working. The Arizona-New Mexico Joint State Committee commuted Mr. Manso's discharge to a suspension without pay. Mr. Manso was reinstated to the casual list within a week after his June discharge.

Not long after completing his suspension, Manso was late for work on two occasions. The first incident was on August 11, 1989 and he was given a warning letter for tardiness. The second incident was on August 17, 1989 and this time he was discharged.

As an excuse for his tardiness on August 17, 1989, Mr. Manso told his supervisor that his car broke down on the freeway. He volunteered that he was assisted by Officer Smith of the Bernalillo County Sheriff's Department. When pressed for specifics, however, Mr. Manso became evasive and said he did not want to explain why he was late. At the suggestion of Local 492 Shop Steward Walter Maesta, Albuquerque Branch Manager Mike Long, and Operations Manager Ed Fultz checked out Mr. Manso's story with the Bernalillo County Sheriff's Department. After doing that, they concluded that Mr. Manso's explanation was not legitimate and that his tardiness was not excused. Mr. Manso was discharged on August 21, 1989.

Through Local 492, Mr. Manso again lodged a grievance and again a hearing was held before the Arizona-New Mexico Joint State Committee ("JSC"). The JSC is comprised of an equal number of representatives of labor and management - none of whom can be affiliated with the company or local union involved in the dispute. This time the JSC concluded that just cause existed for the termination of Mr.

Manso and denied his grievance. Under WSA Article 45, § 1(a), the JSC's decision was final and binding.

After losing his grievance, Mr. Manso filed an unfair labor practice charge with Region 28 of the National Labor Relations Board. He alleged that he was discharged in violation of NLRA §§ 8(a)(3) and (4), 29 U.S.C. § 158(a)(3) and (4) (1988) because he previously had filed an unfair labor practice charge and provided testimony to Region 28 of the Board. The unfair labor practice charge challenging Mr. Manso's August 1989 discharge was the subject of a hearing before Administrative Law Judge Walter J. Maloney the week of January 8, 1990.

At the hearing, Mr. Manso testified under oath. He repeated the story about his car breaking down while on his way to work on August 17, 1989. He also repeated the story about being assisted with his stranded automobile by Officer Smith of the Bernalillo County Sheriff's Department. To Mr. Manso's and Counsel for the General Counsel's visible surprise, however, Officer Smith appeared and testified at the hearing. In flat refutation of Mr. Manso, Officer Smith testified that he stopped Mr. Manso for speeding the morning of August 17 at a time long after Manso should already have been at work. Manso's car was just fine and Officer Smith was not there to help a stranded motorist.

Given Officer Smith's testimony, the Administrative Law Judge recognized the implausibility and direct contradiction of Mr. Manso's testimony. Judge Maloney specifically found that "Manso was lying." (Appendix, Page B-59). The finding that Manso purposefully testified untruthfully was not rejected or even questioned by the Board or Tenth Circuit.

REASONS FOR GRANTING WRIT

A. Introduction.

This case involves issues of substantial public importance over which the Court of Appeals for the Tenth Circuit is in conflict with the Courts of Appeals for the Fifth, Seventh, Eighth, and Ninth Circuits. Further, in opposition to this Court's repeated pronouncements concerning the important federal policy favoring private resolution of labor disputes, the Tenth Circuit's decision significantly compromises the rights of labor and management to collectively bargain and maintain contractual relationships. If the decision of the Court of Appeals below is allowed to stand, the exclusivity and finality of private labor dispute resolution processes will be substantially compromised and the integrity and value of the oath taken by witnesses in administrative hearings will be weakened.

B. There Is A Square Conflict between The Tenth And Fifth Circuits Over The Binding Effect Of Arbitrator Findings Of Fact.

In its decision in this case, the Tenth Circuit concluded that the Board was not bound to honor the Joint State Committee's determination that Mr. Manso was discharged for cause. That holding is in conflict with federal labor policy favoring private resolution of labor disputes and with the Fifth Circuit's holding in *Owens v. Texaco, Inc.*, 857 F.2d 262 (5th Cir.), *cert. denied*, 490 U.S. 1046 (1990). In *Owens*, the Fifth Circuit held:

> [U]nder the *Steelworkers' Trilogy*, the arbitral decision is final and binding to the extent it resolves

> questions of contractual rights. The employee may assert his independent statutory rights . . . but the arbitrator's interpretation of the contract status of the parties is controlling.

Id. at 265 (citations omitted).

Here, the Joint State Committee determined that ABF had just cause to terminate Manso in August 1989. That finding might not be dispositive on the unfair labor practice question under sections 8(a)(3) and (4) of the Act, but it most certainly is dispositive of the contractual relationship between ABF and Manso. *See generally Gilmer v. Interstate Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647, 1656-1657 (1991); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66 (1975). Thus, under section 10(c) of the Act, 29 U.S.C. § 160(c), the Board's authority in NLRB case 28-CA-9916 was limited to declaratory and injunctive relief. The NLRA does not empower the Board to bind employers to a contractual relationship found through final and binding arbitration to have been properly terminated.

—

The federal labor policy favoring private dispute resolution applicable to Manso's termination and to the issue in *Owens* is the exclusivity of arbitral rulings on contractual rights. *See Gateway v. United Mine Workers*, 414 U.S. 368, 94 S. Ct. 629 (1974). This federal policy is firmly grounded in Congress' command in Section 203(d) of the Act that: "the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement" should be the method of disputes resolution agreed by the parties. 29 U.S.C. § 173(d) (1988). When an arbitrator or grievance panel

with proper authority applies a labor contract, its decision is exclusive, it is final, and it is binding. Absent unfair representation or other significant irregularity in the proceedings, the arbitrator's decision about contractual rights cannot be interfered with. *See Owens*, 857 F.2d at 265.

By condoning the fiction that there is a difference between contractual just cause and statutory just cause, the Tenth Circuit has undermined this Court's repeated pronouncements beginning with *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). To wit: final resolution of disputes arising under collective bargaining agreements through private arbitration is favored. Allowing the Board to override decisions made in arbitration and to re-establish an employees status under the labor contract is at odds with federal labor policy.

Recognizing the finality of arbitral findings of fact does not interfere with the NLRB's role in deciding unfair labor practice charges. The Board can hear unfair labor practice cases, decide whether the Act has been violated, and enter declaratory, injunctive, and other equitable relief when warranted. To force a business to rehire an individual after an arbitral body chosen by labor and management has ruled that the employee has no right to employment under the labor contract, however, is to frustrate the right recognized by federal labor policy for private resolution of labor disputes. When sections 8(a), 10(c), and 203(d) of the Act are placed side by side, the conclusion is clear: the Board's remedial power, when there are separate findings of just cause for discharge and commission of an unfair labor practice, is limited to injunctive and declaratory relief—it cannot order backpay and reinstatement.

C. The Tenth Circuit's Decision Is In Derivation Of NLRA § 10(c) And Federal Policy Favoring Collective Bargaining And Private Resolution Of Disputes Involving Application Of Collective Bargaining Agreements.

Section 10(c) expressly prohibits reinstatement and backpay to an employee where there was just cause for the employee's termination.[1] In this case, the Joint State Committee and the Administrative Law Judge concluded that Petitioner had just cause to discharge Mr. Manso. Nevertheless, the Tenth Circuit allowed the Board to substitute its opinion for that of the grievance committee on the existence of just cause. (Appendix A-1). Allowing the Board to substitute its judgment for that of the arbitrator on the issue of just cause is contrary to the statute, is contrary to the federal policy favoring private resolution of labor disputes, and interferes with the finality of grievance procedures that is a cornerstone to effectiveness of private dispute resolution procedures. In effect, the parties' agreement to arbitrate terminations would be eviscerated if the NLRB is allowed veto power over just cause determinations. The Act enables the Board to prohibit unfair labor practices without interferring with contractual relationships and that is the obvious purpose of section 10(c). In this case, the Tenth Circuit has authorized the Board to go further than the Act contemplates and to impose its view of contractual rights on labor and management.

Consistent with the clear implication of section 10(c), the purposes of the Act are not served by awarding reinstatement with backpay to an employee who engaged in conduct warranting discharge, even when the discharge violated sec-

[1]In pertinent part Section 10(c) provides: "no order of the Board *shall* require the reinstatement of any . . . employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged *for cause*." 29 U.S.C. § 160(c)(emphasis added).

tions 8(a)(3) or (4). As discussed below, circuit courts in several cases have recognized that reinstatement is not appropriate just because the former employee was the subject of a discriminatory employment practice.

1. *Cases Applying Section 10(c).*

Although the Board has authority to order reinstatement and backpay to effectuate purposes of the NLRA, reinstatement is not always proper even if the former employee was the subject of discrimination. The express language of section 10(c) makes clear that policies of the Act are not served by awarding reinstatement and backpay to an employee affected by conduct prohibited by sections 8(a)(3) and (4) where there was just cause for that employee's discharge. *NLRB v. Big Three Indus. Gas & Equip. Co.*, 405 F.2d 1140, 1143 (5th Cir. 1969); *NLRB v. Apico Inns*, 512 F.2d 1171, 1175. (9th Cir. 1975). In *Apico Inns*, the Ninth Circuit denied enforcement of an NLRB reinstatement order for an employee fired in retaliation for use of union grievance procedures because the employee had been uncooperative and disruptive. Given the employee's behavior, the circuit court explained that reinstatement would bid "ill for all concerned." 512 F.2d at 1175. *See also Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097 (8th Cir. 1981); *Pacific Tel. & Tel. Co. v. NLRB*, 711 F.2d 134 (9th Cir. 1983) (since employees were discharged for cause, reinstatement and backpay improper under section 10(c) even though employer violated employees' *Weingarten* rights); *General Teamsters Local No. 162 v. NLRB*, 782 F.2d 839 (9th Cir. 1986) (strikers who were discharged in violation of sections 8(a)(1) and 8(a)(3) denied reinstatement and backpay because they were guilty of strike misconduct).

In all the cases cited above, reinstatement with backpay was found not to serve policies of the NLRA because that remedy would reward an employee for improper conduct. Here, Manso was deceitful about the reason for his tardiness and ABF was highly skeptical of his explanation. The Joint State Committee concurred that ABF had just cause to discharge Manso. ABF's suspicion was proved justified when it became clear, through the testimony of Bernalillo County Sheriff's Deputy Smith, that Manso had lied. Just cause existed for Manso's termination and the policies of the NLRA will not be served by reinstatement with backpay. More pointedly, section 10(c) prohibits reinstatement under these circumstances.

2. *Applicable Rules of Statutory Construction.*

A long standing rule of statutory construction is that courts will not interpret a statute in a manner that makes a particular provision unnecessary or insignificant. Rather, "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343, 1349 (10th Cir. 1987), *citing,* 2 A. N. Singer, *Sutherland Statutory Construction* (4th ed. 1984), § 46.06. *See also Mackey v. Lanier Collections Agency,* 486 U.S. 825, 837 (1988). Under the Tenth Circuit's decision, however, section 10(c) is no more than an insignificant and unnecessary reiteration of sections 8(a)(3) and (4).

One, the NLRB undeniably has responsibility under sections 8(a)(3) and (4) for determining whether a contested termination from employment was discriminatory. On the other hand, if backpay and reinstatement are authorized anytime the Board finds that a discharge was discriminatory, there would be no need for the just cause provision in section 10(c). A positive finding on the issue of discrimination under section 8(a) would conclusively dispose of the just cause issue under section 10(c). Thus, Counsel for the Board's rationale would eliminate all significance to the just cause proviso. Section 10(c) would be superfluous.

Two, unlike the issue of discrimination under sections 8(a)(3) and (4), the Act does not expressly assign to the Board responsibility for making findings on the just cause issue. Section 10(a) expressly empowers the Board and only the Board to prevent unfair labor practices under sections 8(a) and (b) of the Act. In contrast, Section 10(a) does not expressly empower the Board to determine the issue of just cause. As this Court and every other court in the land has said at one time or another, the expression of one thing implies exclusion of another ("*expressio unius est exclusion alterius*"). *See Rawson v. Sears, Roebuck & Co.,* 822 F.2d 908, 921 (10th Cir. 1987). *See also Touche Ross & Co. v. Redington,* 442 U.S. 560, 568, 99 S.Ct. 2479, 2485-87 (1979) (no implied private right of action under one section of statute where another section of statute expressly allowed for private action). By expressly assigning to the Board exclusive power to decide whether unfair labor practices were committed under section 8(a) without expressing a similar power on the issue of just cause under section 10(c), Congress created an inference that the Board is not the exclusive authority for just cause determination.

The rationale of the *expressio unius* maxim is bolstered in this case by two additional points. *Except* for the just cause proviso, every sentence in section 10(c) refers to findings by the Board or to affirmative powers of the Board. The sentence in section 10(c) regarding just cause does not mention

the phrase in connection with findings by the Board, and this sentence is a limitation on Board power—not an expression of it.

Additionally, the term just cause is not defined in the Act. In contrast, the term "unfair labor practices" is defined and the conduct prohibited is spelled out. NLRA §§ 2 and 8(a)(1)-(5), 29 U.S.C. §§ 152(8) and 158(a)(1)-(5). If Congress wanted the NLRB and only the NLRB to determine just cause, it could have defined the term as it did with the prohibited conduct it assigned to NLRB scrutiny. *See, e.g., Zapata Haynie Corp. v. Arthur,* 926 F.2d 484, 487 (5th Cir. 1991); Holmes, *The Theory of Legal Interpretation* 12 Harv. L. Rev. (1898). Indeed, in 1947 Congress refused to amend the NLRA to give the Board unfair labor practice jurisdiction over all matters arising under collective bargaining agreements. S. Rep. No. 105, 80th Cong. 1st Sess., 20-21 (1947), H.R. Rep. No. 245, 80th Cong. 1st Sess., 21 (1947).

Third, the just cause proviso in section 10(c) has significance independent of the discrimination provisions in section 8(a)(3) and (4). If Congress had intended "just cause" under the Act to be no more than a synonym for "non-discrimination," the logical thing to do would be to use the terminology in the same section of the Act. As explained by one authority on statutory construction:

> [T]he distinction between a subsection and an independent section of a statute is that the subsection, by its nature, is placed within a context and thereby limited to the degree that the independent section is not.

2 A. N. Singer, *Sutherland Statutory Construction* (5th ed. 1992), § 47.01. The just cause proviso is *not* a subsection of section 8(a) and by inference its meaning is *not* limited by that section. To the contrary, just cause means much more than non-discrimination for union activity or participation in Board proceedings.

Fourth, giving a meaning to the term just cause broader than the inverse of conduct prohibited by sections 8(a)(3) and (4) is consistent with the evolution of collective bargaining and labor relations law in this country. Before the Act was amended in 1947, it already prohibited discriminatory and retaliatory terminations. National Labor Relations Act §§ 8(3) and (4), 29 U.S.C. §§ 158(3) and (4) (1935).[2] The language used for defining employer unfair labor practices was carried over largely unchanged from the original NLRA (The Wagner Act) to the amended NLRA (The Taft-Hartley Act) in 1947.

In contrast to prohibited unfair labor practices, the term just cause was nowhere to be found in the NLRA before it was amended in 1947. The term was commonly used in collective bargaining agreements between labor unions and employers, however, as a standard by which to evaluate the right to terminate employees. *See, e.g., Rubberset Co.,* 1 LA (BNA) 471 (1945), *Verdun Mfg. Co.,* 10 LA (BNA) 637 (1947). *See also* A. Cox, *Cases on Labor Law* (1948), at 214-15, 343-44; BNA Contract Clause Finder (1945) § 40.13; L. Teller, *Labor Disputes and Collective Bargaining* (1940), at 506-07. In the industrial relations setting, just cause as a restraint on termination of employment was predominantly a concept of labor arbitration. Logic would dictate that Congress adopted this term with the understand-

[2]The original version of the NLRA was known as the Wagner Act. Act of July 5, 1935, c. 372, 49 Stat. 452.

ing that it was a term of art and would continue to be applied by duly selected labor arbitrators even in the face of pending unfair labor practice charges. *See, e.g., Perera v. Siegel Trading Co.*, 951 F.2d 780, 783 (7th Cir. 1992) (by using a term of art Congress intended to retain the term's pre-established meaning); *Stedor Enters v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (same).

In summary, before the NLRA was amended in 1947, it already prohibited discriminatory and retaliatory terminations. There would have been no purpose to the amendment adding the just cause proviso if a ruling in a former employee's favor under sections 8(a)(3) or (4) necessarily meant her termination was without just cause. Section 10(c) cannot be presumed to be redundant, and the most plausible view of Congress' intent is that just cause under section 10(c) means more than simply a termination that does not violate sections 8(a)(3) or (4).

D. There is A Square Conflict In The Circuits Over The Availability Of Equitable Relief To An Employee Who Testified Dishonestly In An Administrative Proceeding Under The NLRA.

Michael Manso testified untruthfully when he told the Administrative Law Judge that he was late for work on August 17 because his car broke down. To borrow Judge Maloney's words — "Manso was lying." (Appendix B-59). The Board did not take issue with Judge Maloney's findings and it is plain from the record that Manso made up a story he knew to be untrue.

Other than the Tenth Circuit, the courts have refused reinstatement of an employee unlawfully discharged when the employee was guilty of unlawful or offensive conduct that would "bid ill for all concerned if renewal of the relationship were compelled." *See, e.g., NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975) (reinstatement improper where employee lied on the stand and falsified timecard); *NLRB v. Commonwealth Foods, Inc.*, 506 F.2d 1065, 1067 (4th Cir. 1974) (reinstatement improper where employee failed polygraph); *Northstar Refrigerator Co.*, 207 NLRB 500 (1973), *modified sub. nom., NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975) (reinstatement of an employee who committed perjury is improper). If the Board's order of reinstatement is enforced, Manso will be rewarded for lying to ABF and lying to Judge Maloney. Even when there is evidence that an unfair labor practice occurred, the purposes of the Act are better served by confining the award to declaratory relief and notice posting, not to an award that reinforces false testimony.

Recently, in *Precision Window Manufacturing v. NLRB*, 963 F.2d 1105 (8th Cir. 1992), the Eighth Circuit refused to enforce an NLRB order requiring reinstatement of an employee who lied under oath in a ULP hearing. In that case, the employer said it terminated the employee for lying to his supervisor about inability to work on a Saturday. The employee/charging party testified untruthfully that he was passing out union cards before his dismissal. The ALJ found that the employee was fired for union activity and the lying rationale was employed "for something to pin on" the employee. In refusing to enforce the NLRB order requiring reinstatement, the Eighth Circuit stated:

> This court refuses to take the Board's processes as lightly as the Board apparently does. . . . 'The purposes and policies of the Act do not justify full reinstatement of an employee whose dishonesty has been established and whose untruthful testimony abused the process he now claims should grant him full relief.' Specifically, *an employee forfeits his reinstatement remedy when he purposefully testifies falsely* during an administrative hearing.

Id. at 1110 (citations omitted) (emphasis supplied). The Eighth Circuit added: "No tribunal should be required to plumb the depths of deceit and skulduggery to discover the truth." *See also Iowa Beef Packers, Inc. v. NLRB*, 331 F.2d 176 (8th Cir. 1964); *NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975); *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181 (7th Cir. 1964).

In an attempt to distingish *Precision Window*, the Tenth Circuit focused on Manso's original lie to ABF. The court reasoned that Manso had to lie to ABF about why he was late to work to avoid being fired under a policy the NLRB subsequently found to be improper. (Appendix A-1). This distinction is technical and meaningless.

Further, even if there was substance to the distinction offered by Tenth Circuit, the court's rationale is flawed. The court focused only on Manso's original lie—not his perjured testimony. Even assuming Manso was entitled to lie to his employer, no one is entitled to lie to an Administrative Law Judge while under oath and giving testimony.

There is no support for the court's implicit rationalization for Manso's lie. Neither the ALJ nor the Board found that Manso acted with justification. During direct examination, Manso could and should have testified truthfully. (*i.e*, That he had been late to work the second time because he had over-slept, not because he had car trouble). Then he could have explained why he felt compelled to lie to ABF. Instead, Manso chose to commit perjury for an obvious reason: if he could convince the Administrative Law Judge that he was an innocent victim of car trouble, he had an excuse for being late to work. Manso could then argue that ABF terminated him even though he had an excuse. Contrary to the Tenth Circuit's conclusion, Manso's perjured testimony was "highly relevant" to whether ABF terminated Manso for his union activities.

By its decision, the Tenth Circuit has condoned an employee's manipulation of the NLRB process as a means to obtain monetary relief. The Tenth Circuit's decision ignores the defining principle of justice: to seek the truth. Instead, the Tenth Circuit rewards dishonesty and thereby encourages charging parties to lie. There is little to lose and all to gain.

Finally, the Tenth Circuit's decision ignores the rationale in *Precision Window* for denying reinstatement to a perjuror. The policies of the NLRA will not be satisfied by reinstating an employee whose untruthful testimony abused the NLRB process he now claims should grant relief. *Precision Window*, 963 F.2d at 1110. Much to the contrary, the decision by the Tenth Circuit is published approval for untruthful testimony, and that undercuts both the adjudicatory system created by the Act and the integrity of the oath given

by witnesses in all formal legal proceedings. Accordingly, the Tenth Circuit's decision should be overruled.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Tenth Circuit in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 24, 1993 three copies of ABF Freight System, Inc.'s Petition for a Writ of Certiorari were served by first class and postage pre-paid United States mail to the following attorneys of record for all parties:

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4128R/9590H

APPENDIX A—Opinion of the United States Court of Appeals, Tenth Circuit, Decided December 29, 1992.

Jerry MIERA; Andy Trujillo; Albert Miranda; Chad Sullins; Arnold Haynes, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

ABF Freight System, Inc., Intervenor.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

ABF FREIGHT SYSTEM, INC., Respondent.

Nos. 91-9573, 92-9506.

United States Court of Appeals, Tenth Circuit.

Dec. 29, 1992.

On consolidated petition for review and petition for enforcement of National Labor Relations Board (NLRB) decision and order on unfair labor practices claims against national motor freight business, the Court of Appeals, Seymour, Circuit Judge, held that: (1) substantial evidence supported

Board determination that employer did not commit unfair labor practice by discharging casual dockworkers pursuant to its interpretation of contract provision creating new category of "preferential casual" dockworkers or in refusing to reinstate discharged workers unless they signed waivers of their rights under that provision; (2) substantial evidence also supported Board determination under "mixed motive" analysis that discharge of preferential casual dockworker who had filed unfair labor practice charge, purportedly for tardiness, was not for cause; and (3) discharged employee's act of lying to his employer on one occasion about reasons for his tardiness did not rise to level of misconduct requiring denial of reinstatement for public policy reasons.

Review petition denied; enforcement petition granted.

1. Labor Relations ⇐703

Court of Appeals will grant enforcement of National Labor Relations Board (NLRB) order when agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole.

2. Administrative Law and Procedure ⇐791

Labor Relations ⇐680

Factual findings of National Labor Relations Board (NLRB) are deemed conclusive if, considering record as whole, they are supported by "substantial evidence"; "substantial evidence" is such relevant evidence as reasonable mind might accept as adequate to support conclusion. National Labor Relations Act, § 10(e, f), as amended, 29 U.S.C.A. § 160(e, f).

See publication Words and Phrases for other judicial constructions and definitions.

3. Administrative Law and Procedure ⇐676

Labor Relations ⇐672

Although standard of review of factual findings of National Labor Relations Board (NLRB) is not altered when administrative law judge (ALJ) and Board reach opposite conclusions, ALJ's findings are part of record and must be considered.

4. Labor Relations ⇐560, 565

Substantial evidence supported National Labor Relations Board (NLRB) determination that national motor freight business did not commit unfair labor practice by discharging casual dockworkers pursuant to company's interpretation of contract provision creating new category of "preferential casual" dockworkers and subsequently

refusing to reinstate them unless they signed waivers of their rights under that provision. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

5. Labor Relations ⇐465, 671

National Labor Relations Board (NLRB) did not have to defer to finding in prior arbitration that employee was discharged for cause, and review by Court of Appeals was limited to determining whether Board abused its discretion in choosing not to defer.

6. Labor Relations ⇐560, 614

Under "mixed motive" analysis, substantial evidence supported National Labor Relations Board (NLRB) finding that national motor freight business' discharge of preferential casual dockworker who had filed unfair labor practice charge against it, purportedly for tardiness, was not for cause, and Board thus was not limited to remedy of declaratory relief. National Labor Relations Act, § 10(c), as amended, 29 U.S.C.A. § 160(c).

7. Labor Relations ⇐539

In "mixed-motive" cases, following showing that antiunion animus contributed to employer's decision to discharge employee, burden of proof shifts to employer to show that employee would have been discharged absent any protected union activity.

8. Labor Relations ⇐671

Any error from administrative judge's introduction of, and National Labor Relations Board's reliance on, allegedly irrelevant evidence regarding other employees of national motor freight business was harmless, in light of ample evidence of antiunion animus which by itself supported Board's decision.

9. Labor Relations ⇐614

National Labor Relations Board (NLRB) has wide discretion in assessing whether, in its judgment, a particular remedy will effectuate policies of Act.

10. Labor Relations ⇐614

National Labor Relations Board (NLRB) did not abuse its considerable discretion in deciding that employee's conduct in lying to his employer about the reason for his tardiness on one occasion did not rise to level of misconduct requiring denial of reinstatement, for public policy reasons. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

Paul J. Kennedy, Albuquerque, NM, for petitioners.

Howard E. Perlstein, Supervisory Atty., John H. Fawley, Attorney, Jerry M. Hunter, General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel, N.L.R.B., Washington, DC, for respondents.

John V. Jansonius and Jill J. Weinberg of Haynes and Boone, L.L.P., Dallas, TX, for intervenor.

Before McKAY, Chief Judge,
SEYMOUR, and KELLY, Circuit Judges.

SEYMOUR, Circuit Judge.

These consolidated appeals come to the court on a petition for review in appeal No. 91-9573, filed by Jerry Miera, Andy Trujillo, Albert Miranda, Chad Sullins, and Arnold Haynes ("Petitioners"), challenging a decision against them by the National Labor Relations Board (the "Board") on unfair labor practice claims against their former employer, ABF Freight System, Inc. (ABF); and on an application for enforcement in appeal No. 92-9506, filed by the Board in connection with another part of that same decision, charging ABF with unfair labor practices against former employee Michael Manso.[1] The cases were consolidated because they arise from the same set of facts and because they both involve review of the Board's Decision and Order reported at 304 NLRB No. 75, 1991 WL 181854 (N.L.R.B.) (1991) ("D & O"). The facts underlying this appeal are detailed in that decision and will be repeated here only in part.

I

The following facts are relevant to our disposition of these appeals. ABF operates a large, national, motor freight business, including a truck terminal in Albuquerque, New Mexico. The Albuquerque facility employs approximately one hundred dockworkers, who are represented by Teamsters Local 492. The majority of ABF's dockworkers are on the regular seniority list, whether employed full or part-time, and enjoy certain benefits as employees under a regional agreement between the union and a multi-employer collective bargaining unit in which ABF participates. In addition, ABF employs casual dockworkers, who originally had no standing as employees under the regional agreement. A 1988

1. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R.App.P. 34(a); 10th Cir.R. 34.1.9. The cases are therefore ordered submitted without oral argument.

supplement to the agreement altered the rights of ABF's casual dockworkers by creating a new category of workers, "preferential casual" dockworkers, who were given certain limited rights. Petitioners, along with Michael Manso, were employed as casual dockworkers at the Albuquerque facility when the supplement became effective.

ABF and the union disagreed as to the meaning of the contract provision creating the new category, and as to the impact of the provision on ABF's existing casual dockworkers. Petitioners, Manso, and others were discharged by ABF pursuant to the company's interpretation of the contract. After the union filed a grievance on behalf of the discharged dockworkers, both the first-step and second-step grievance panels deadlocked. Ongoing negotiations between the union and ABF, while settling the dispute as to some of the discharged workers, did not resolve the grievance as to Petitioners or Manso. During the negotiations, ABF refused to reinstate the discharged workers unless they signed waivers of their rights under the preferential casual contract provision.

Manso and one of the Petitioners, Andy Trujillo, filed an unfair labor practice charge against ABF on behalf of Manso and all of the Petitioners. A third-step

grievance panel subsequently reached a decision requiring ABF to offer reinstatement to the discharged workers as "preferential casuals." ABF complied.

When ABF created its preferential casual list, it also implemented a verification policy for work calls that applied only to preferential casuals. Under the verification policy, a supervisor would ask another union employee to telephone a preferential casual to come to work. If the preferential casual did not answer the call, the union employee would sign a sheet verifying the lack of response. After a preferential casual failed twice to respond to such work calls, ABF could discharge him.

There was testimony that shortly after the discharged dockworkers were reinstated, three of ABF's supervisors individually warned Manso that the company was "gunning" for him. Manso was subsequently discharged for his second failure to respond to a work call, under the new verification policy. Manso filed a grievance. Evidence at the grievance hearing established that a supervisor would not allow the employee calling Manso to redial his number after the employee expressed concern that he had misdialed. Manso was reinstated without backpay.

Not long thereafter, Manso received a disciplinary warning letter after reporting

to work four minutes late. The evidence shows that ABF did not have a tardiness policy at that time, but Manso was warned that he should expect "the worst," including discharge, for future tardinesses. ABF then implemented a tardiness policy applicable only to preferential casuals: two unexcused tardinesses would result in discharge. Manso subsequently reported almost one hour late to work. He provided an excuse for his tardiness; he said that his car had broken down on the freeway. ABF investigated his story and concluded that he was lying. ABF discharged Manso under its tardiness policy. Manso filed a grievance, and repeated his excuse at the first-step grievance hearing. Other evidence contradicted Manso's story and his discharge was upheld at the first-step level. Manso failed to pursue his grievance further, but he filed another unfair labor practice charge against ABF.

II

These appeals arise out of the two unfair labor practice charges. After a hearing on the consolidated cases, an administrative law judge (ALJ) issued a decision that ABF had violated various provisions of the National Labor Relations Act, 29 U.S.C. §§ 141–187, 557 (the Act), in connection with its initial discharge and refusal to

reinstate Manso and Petitioners, and in connection with its subsequent discharge of Manso for failure to respond to work calls. The ALJ found that Manso's third discharge, under ABF's tardiness policy, was a discharge for cause.

On review, the Board disagreed with the ALJ that the initial discharge of Manso and Petitioners was in violation of the Act, and disagreed that Manso's final discharge was for cause. The Board therefore dismissed Petitioners' charges, and ordered ABF to offer reinstatement to Manso and to award him backpay and interest.

[1, 2] We have jurisdiction over these appeals under 29 U.S.C. § 160(e), (f). We will grant enforcement of an NLRB order when the agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole. *Colorado–Ute Elec. Ass'n, Inc. v. NLRB*, 939 F.2d 1392, 1400 (10th Cir.1991), *cert. denied*, — U.S. ——, 112 S.Ct. 2300, 119 L.Ed.2d 223 (1992). We review questions of law presented by this appeal de novo. *See Facet Enters., Inc. v. NLRB*, 907 F.2d 963, 969 (10th Cir.1990). The Board's factual findings are deemed conclusive if, considering the record as a whole, they are supported by substantial evidence. 29 U.S.C. § 160(e), (f). "Substantial evidence is 'such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion.'" *Facet Enters.*, 907 F.2d at 969 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)). Employing these standards, we affirm the Board's decision and order.

III

In appeal No. 91-9753, Petitioners raise two issues. They claim generally that the Board erred in dismissing their unfair labor practice charges against ABF, and they contend more specifically that the Board erroneously rejected the ALJ's credibility determinations in reaching its ruling. Essentially, they seek a return to the ALJ's ruling that ABF violated the Act in initially discharging them and in refusing to reinstate them.

The ALJ's ruling was based in part on his interpretation of the contract provision creating the preferential casual category. His decision implicitly found ABF's interpretation of the contract unreasonable, and consequently its reliance on that interpretation in discharging Petitioners unreasonable. The Board, on the other hand, found that ABF discharged Petitioners pursuant to a "nondiscriminatory, reasonable, and arguably correct interpretation of the agreement." D & O at *6.

[3, 4] Our standard of review of the agency's factual findings is not altered when the ALJ and the Board reach opposite conclusions; however, the ALJ's findings are part of the record and must be considered. *Harberson v. NLRB*, 810 F.2d 977, 983 (10th Cir.1987). After a careful review of the record on appeal, we conclude that the Board's finding of reasonableness, as well as its ultimate determination that ABF did not violate the Act in discharging and subsequently refusing to reinstate Petitioners, is supported by substantial evidence.

We disagree with Petitioners' argument that the Board rejected the ALJ's credibility determinations in reaching its result. The Board credited the ALJ's credibility determinations, *see, e.g.*, D & O at *5, but differed as to the ultimate import of the evidence. The Board need not reject the ALJ's credibility determinations to conclude that other evidence outweighs or offsets that evidence, compelling a different result.[2]

2. Because we affirm the Board's dismissal of Petitioners' claims against ABF, we need not address ABF's contention that the Board should have deferred to the findings of the National Grievance Committee supporting its arbitration award at the third-step level.

IV

In appeal No. 92-9506, the Board seeks enforcement of its order requiring ABF to pay back wages and interest and to offer reinstatement to Michael Manso following its finding that Manso's discharge was unlawfully motivated. Respondent ABF argues that 1) the Board's order violates section 10(c) of the Act because Manso was discharged for cause, 2) the Board disregarded evidence that Manso was discharged for cause, 3) no evidence supports the Board's inference that the managers who discharged Manso knew he had engaged in protected union activity, 4) the Board improperly relied on evidence about other, non-similar employees, 5) the record does not support the Board's finding of retaliatory animus against Manso, 6) the Board's award of backpay and reinstatement violates public policy, and 7) the Board's order improperly exceeded the scope of Manso's exceptions to the ALJ's decision.

ABF first argues the Board erred in finding that Manso's third discharge was not for cause. Section 10(c) of the Act, 29 U.S.C. § 160(c), prohibits the Board from requiring reinstatement of an individual discharged for cause. ABF points out that the first-step grievance panel found Manso was discharged for cause, and argues that this finding is "final and binding." Respondent's Brief at 21. ABF contends that the Board could therefore not redetermine this fact issue and that its authority under section 10(c) was limited to declaratory relief.

[5, 6] We do not view the Board's authority so narrowly. The Board need not defer to findings in a prior arbitration. *See NLRB v. Gould, Inc.*, 638 F.2d 159, 165–66 (10th Cir.1980), *cert. denied*, 452 U.S. 930, 101 S.Ct. 3065, 69 L.Ed.2d 430 (1981). Deference to such an award is within the Board's "wide discretion," and our review is limited to determining whether the Board abused its discretion in choosing not to defer. *Id.* at 166. Following our review of the record on appeal, we conclude the Board did not abuse its discretion; as we determine below, ample evidence supports its independent finding that Manso's third discharge was not for cause. Accordingly, we also disagree that the Board's authority to fashion a remedy was limited to declaratory relief. *See Interior Alterations, Inc. v. NLRB*, 738 F.2d 373, 377 (10th Cir.1984) (Board has wide discretion in its choice of remedies and is empowered to order reinstatement and backpay).

In concluding that Manso had not been discharged for cause, the Board relied on evidence in the record that Manso was expressly discharged for tardiness, not for lying about his excuse for being late. The

record contains testimony that, had Manso provided a legitimate excuse, he would not have been discharged under ABF's preferential casual tardiness policy. ABF argues that, but for Manso's lying about his excuse, he would not have been discharged; therefore, he was discharged for his dishonesty.

[7] In "mixed-motive" cases such as this one, following a showing that antiunion animus contributed to an employer's decision to discharge the employee, the burden of proof shifts to the employer to show that the employee would have been discharged absent any protected union activity. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, 103 S.Ct. 2469, 2471, 76 L.Ed.2d 667 (1983); *YMCA of the Pikes Peak Region, Inc. v. NLRB*, 914 F.2d 1442, 1452 n. 10 (10th Cir.1990), *cert. denied*, — U.S. ——, 111 S.Ct. 1681, 114 L.Ed.2d 77 (1991). ABF advances several arguments in support of its contention that the record does not support a finding of retaliatory intent. However, our review of the record reveals abundant evidence of antiunion animus in ABF's conduct towards Manso.

When Manso returned to work at ABF following his first reinstatement, he was warned that the company was out to get him. During the grievance hearing on his second discharge, evidence showed that the

work call verification policy was being used in a discriminatory fashion against Manso. The tardiness policy, under which Manso was discharged for the third time, was applied retroactively to Manso, as his first instance of tardiness occurred before the policy was instituted. We also note that, although the Board did not rely on this evidence, D & O at *7 n. 11 & *9, antiunion animus was demonstrated in ABF's implementation of policies exclusive to preferential casuals.

ABF asserts there was no proof that the managers who discharged Manso—Johnson, Hatfield and Fultz—knew about his protected union activity, and contends such knowledge cannot be imputed to them. However, the record contains evidence that Johnson was served with a copy of Manso's unfair labor practice charge against ABF, and that Hatfield knew generally which employees filed unfair labor practice charges against the company. Hatfield and Johnson received copies of the disciplinary notices sent to employees by Fultz. Moreover, ABF did not offer testimony that Hatfield, Johnson and Fultz lacked such knowledge when they decided to discharge Manso. On this record, the Board could reasonably infer that some or all of these individuals had knowledge of Manso's protected union activity.

We conclude that, under the mixed-motive analysis applicable here, *see YMCA of the Pikes Peak Region*, 914 F.2d at 1452 n. 10, substantial evidence supports the Board's determination that the General Counsel for the Board proved a prima facie case of unlawful discriminatory discharge, and that ABF did not meet its burden of showing that Manso would have been discharged in the absence of his protected union activity. Accordingly, the Board's finding that Manso was not discharged for cause, although contrary to that reached by the ALJ, is supported by substantial evidence in the record. *See Harberson*, 810 F.2d at 983.

[8] In light of our conclusion that ample evidence of antiunion animus exists in the record, we need not consider ABF's contentions that the ALJ allowed introduction of, and the Board relied on, allegedly irrelevant evidence regarding other ABF employees. If introduction of this evidence was erroneous, as ABF argues, it was harmless in light of the evidence discussed above which, by itself, supports the Board's decision.

ABF further argues that the Board's award of reinstatement and backpay to Manso violates public policy because giving these remedies to an employee who lied to his employer and to the ALJ does not effectuate the policies of the Act. ABF relies on cases holding that reinstatement is improper where an employee engaged in serious misconduct. *See NLRB v. Breitling*, 378 F.2d 663, 664 (10th Cir.1967); *see also NLRB v. Magnusen*, 523 F.2d 643, 646 (9th Cir.1975) (employee theft precludes reinstatement); *NLRB v. Commonwealth Foods, Inc.*, 506 F.2d 1065, 1068 (4th Cir. 1974) (same).

[9, 10] The Board has wide discretion in assessing whether, in its judgment, a particular remedy will effectuate the policies of the Act. *See Interior Alterations*, 738 F.2d at 377. We do not believe the Board abused its considerable discretion in deciding that Manso's conduct in this case did not rise to the level of misconduct requiring that reinstatement should be denied. *See id.* at 378. We view *Precision Window Mfg. v. NLRB*, 963 F.2d 1105, 1109–10 (8th Cir.1992), as distinguishable. There the employee lied in the first instance during the administrative hearing by misrepresenting facts that were highly relevant to determining whether he was fired for his union activity. Here, to the contrary, Manso's original misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus.

Finally, we reject ABF's complaints that 1) the ALJ and the Board "overlooked" evidence of non-discriminatory treatment of preferential casual, and 2) the Board's decision exceeds the scope of Manso's exceptions to the ALJ's decision, as lacking in merit.

The petition for review in appeal No. 91-9573 is DENIED. The petition for enforcement in appeal No. 92-9506 is GRANTED.

APPENDIX B—Decision and Order of the National Labor Relations Board Decided August 27, 1991 and the Decision of the Administrative Law Judge Decided March 21, 1990.

SCD

D—2223
304 NLRB No. 75 Albuquerque, NM

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ABF FREIGHT SYSTEM, INC.

and

MICHAEL MANSO and ANDY TRUJILLO, Individuals
MICHAEL MANSO, an Individual

Cases 28—CA—9500
28—CA—9916

DECISION AND ORDER

On March 21, 1990, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed

exceptions and a supporting brief, the Charging Parties filed a brief in reply to the Respondent's exceptions, Charging Party Michael Manso filed cross-exceptions and a supporting brief, and the Respondent filed a brief answering the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

In Case 28—CA—9500 (Case 9500) of this consolidated proceeding, the judge found that in June 1988 the Respondent threatened six of its casual dockworkers with discharge if they refused to waive rights under the collective-bargaining agreement, and then discharged and subsequently refused to reinstate them because of their refusals, in violation

[1]The Respondent's June 25, 1990 motion to strike Charging Party Manso's cross-exceptions and brief is denied as lacking in merit. The Board exercised appropriate discretion in response to the Charging Party's timely requests for extensions of time to file his papers. Further, assuming the truth of the Respondent's allegation that it did not receive notice of the April 26, 1990 extension request, it is clear that the Respondent did receive the Charging Party's May 18, 1990 request for an extension of time, and it has made no specific showing of prejudice by the Charging Party's failure to provide notice of its initial request.

The Respondent's July 16, 1990 supplemental motion to strike the Charging Policy's cross-exceptions and brief, alleging their lack of compliance with the Board's Rules and Regulations, is also denied. Although not conforming exactly to the requirements of Sec. 102.46, the cross-exceptions and brief are not so deficient as to warrant striking.

[2]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

of Section 8(a)(3) and (1) of the Act. In Case 28—CA—9916 (Case 9916), the judge found that in June 1989, following reinstatement of the dockworkers pursuant to a grievance/arbitration award, the Respondent violated Section 8(a)(4), (3), and (1) by discharging one of them, Michael Manso, because he had filed an unfair labor practice charge and had taken part in the dockworkers' contractual grievance. Manso was subsequently reinstated again pursuant to the grievance/arbitration procedure, and in August 1989 he was again discharged. The General Counsel alleged that this also violated Section 8(a)(4), (3), and (1). The judge, however, found that Manso was discharged for cause, i.e., dishonesty.

On our careful review of the record, we have determined that there is insufficient evidence to support the General Counsel's allegations and the judge's unfair labor practice conclusions in Case 9500 and, consequently, we dismiss that entire portion of the complaint. In Case 9916, we affirm the judge's finding that Manso was unlawfully discharged in June 1989, but we reverse the judge's dismissal concerning Manso's August 1989 discharge, concluding that it also was in violation of Section 8(a)(4), (3), and (1). The facts set forth below are drawn from the judge's relevant findings of fact, including his credibility resolutions, and from facts undisputed in the record. As we have indicated above, we affirm the judge's findings only to the extent they are consistent with this decision.

I. Case 9500

A. Facts

The Respondent's dockworkers at its Albuquerque, New Mexico trucking terminal, both those on the regular sen-

iority list and those employed on a casual basis, are covered by the Western States Area Agreement for local cartage workers and dockworkers, a supplement to the Teamsters' National Master Freight Agreement. Prior to spring 1988,[3] casual dockworkers under the supplemental agreement were afforded sharply limited rights; in particular, there were no seniority provisions covering casuals with respect to work calls and progression to regular dockworker status. Thus, the Respondent chose freely among the casuals to satisfy its fluctuating dock work requirements and, when a regular dockworker position opened up, the Respondent was not obligated to fill it from among the casuals. The new supplemental agreement concluded in April changed the employment practices concerning casuals. Article 60, section 4(e) (section 4(e)) of the supplemental agreement provided in relevant part:

> (e) Any casual . . . used by the Employer for seventy (70) eight (8) hour shifts within six (6) consecutive months, shall be automatically processed by the Employer to determine whether the casual meets the Employer's hiring standards and qualifications. Such processing shall be completed within thirty (30) calendar days of the last day of the seventieth (70) shift.
>
> Automatic processing may be waived with a written agreement between the individual, the Local Union, and the Employer.
>
> After such processing, if the casual employee meets the Employer's hiring standards and qualications for regular employment, he/she shall be placed on a preferential hiring list for future regular em-

[3]All dates in this section of our decision are in 1988 unless otherwise noted.

> ployment and shall be selected for regular employment in the order in which he/she was placed on the preferential hiring list and he/she shall not be subject to any probationary period. His/her seniority date will be the date he/she is put on the seniority list. Failure of the employer to add casuals from the preferential hiring list in this order shall subject the Employer to runaround claim.
>
> Casual employees who are placed on the preferential hiring list and who meet the Employer's hiring standards and qualifications for regular employment shall have regular monthly health and welfare contributions paid by the Employer on their behalf as set forth in Article 52, Section 1, Health and Welfare, the month following the month such casual first becomes eligible for regular employment. Such contributions shall continue to be paid by the Employer each month thereafter provided the preferential casual satisfies the forty (40) hour eligibility requirement provided in Article 52. Preferential casuals who qualify for regular health and welfare contributions shall also be eligible for regular health and welfare benefits each month a regular contribution is paid by the Employer on their behalf.
>
> If the casual employee does not meet the Employer's hiring standards and qualifications or refuses to accept regular employment while on the preferential hiring list, the casual and the Local Union shall be so notified in writing and his/her use as a casual will be discontinued.
>
> Casual employees on the preferential hiring list shall be offered available extra work in seniority order by classification, as among themselves. The Employer shall not be obligated to make more than

> one (1) call per casual per day and such call need not be verified. However, abuse of this procedure will be subject to the grievance procedure. Further, casuals on the preferential hiring list shall have access to the grievance procedure in the event of disciplinary action.
>
> When an Employer utilizes eight (8) hour supplemental casuals thirty (30) or more days in any two (2) consecutive calendar months, the Employer shall add one (1) regular employee from the preferential hiring list.

Thus, the new procedure applied preference by seniority as to casual work opportunities and regular employment for those casuals placed on the "preferential hiring list."

Soon after the new agreement was reached, a dispute developed between the Respondent's representatives at the Albuquerque terminal and representatives of Teamsters Local 492, bargaining agent for the Respondent's dockworkers, concerning the qualifications for placement on the preferential list pursuant to the terms of section 4(e). The Respondent interpreted the relevant provisions as establishing a time prerequisite—70 work shifts within 6 consecutive months—which, if satisfied, set in motion an "automatic processing" of the casual to determine if he met the Respondent's employment qualifications for a regular dockworker position. If the casual met those qualifications, he would be placed on the preferential list. If not, according to the Respondent's reading, the contract required that he be terminated. The Union interpreted section 4(e) to mean that all casuals meeting the time requirements alone must automatically be placed on the preferential list; once on the list, it would be the Respondent's obligation to train all of them to meet regular dockworker qualifications in preparation for future employment opportunities. Fueling this disagreement was the understanding of both the Respondent and the Union that most of the casual dockworkers were not qualified to drive tractor-trailer rigs—a requirement for regular dockworker employment with the Respondent for about 10 years. At some point prior to June 20, the Respondent offered the Union a compromise position for application of the contract language; the Respondent would place casuals on the preferred list if they satisfied the time requirements, but would be under no duty to train them in order to meet the requisite qualifications until a regular dockworker position became available. The Union did not accept this offer.

Under the new agreement, May 29 was the starting date for initial application of the "automatic processing" provisions of section 4(e). Accordingly, under the Respondent's interpretation, within 30 days from that date, all casuals meeting the time requirements had either to be placed on the preferential list, and thus considered qualified for regular employment, or be terminated. The Respondent's review of its personnel files established that 12 casuals met the time requirements and that none of them was driver qualified.

On June 20, the Respondent forwarded the following letter, signed by the terminal manager, to the 12 casuals:

> In accordance with Article 60, Section 4(e) of the Western States Area Pickup and Delivery, Local Cartage and Dockworker Supplemental Agreement, this is to advise you that you do not meet ABF's hiring standards and qualifications for regular employment. Therefore, your name cannot be added to a preferential hiring list as referred to in the aforementioned Article and your use as casual is being discontinued effective immediately.

In addition, at about the same time, the Respondent's operations manager, Robert Herrington, had discussions with several of these casuals to explain their discharges. It is apparent from the record that these conversations followed the same basic pattern, the essential focus being the meaning of the June 20 discharge letters, the casuals' lack of driver qualifications, the Respondent's view of its contractual duties under section 4(e), and the Union's disputed interpretation. In some of these discussions, and within the context above, Herrington said, to one or another of the discharged casuals, that the Respondent did not want to let the casuals go, that it was concerned about the possibility of putting nondriver-qualified casuals on the preferential list, that the Respondent was not going to have a preferential list and this was the reason for the layoffs, that their terminations were the Union's fault, that the Union was not going to tell the Respondent whom it would hire, and that the Respondent did not want the preferential list and preferred the previous process for hiring regular dockworkers.

On June 21, the Union filed a contractual grievance on behalf of all the discharged casuals. The formal grievance procedure provided for a three-step process of hearings and review before joint panels of union and employer representatives. At about the time of the first step of the procedure, on June 29, Herrington offered the discharged employees reinstatement if they would agree to the waiver procedure set forth in the second paragraph of section 4(e). In the Respondent's interpretation, although the waiver of automatic processing was a waiver of the right to be considered for placement on the preferential list, it was also an alternative to the harsh edge of section 4(e)—discharge if the "processed" casual dockworker did not meet regular employment qualifications. Eventually, 5 of the 12 casuals, with the apparent concurrence of the Union, agreed to the contractual waivers and returned to work.[4] In addition, the Respondent determined on a further review of one casual's personnel record that he was in fact driver qualified as a result of previous employment, and it placed him on its regular dockworker seniority list. The remaining six—the alleged discriminatees in this case—did not agree to the waivers.

The first-step grievance panel deadlocked on the dispute. Soon thereafter, the Respondent renewed its compromise offer: immediate placement of all time-qualified casuals on the preferential list, but no driver training obligation until a regular dockworker position became available. The Union again was unwilling to accept this. The second-step grievance panel also deadlocked on the contractual question. On April 6, 1989, the third-step panel resolved the dispute by nullifying the contractual waivers that five of the grievants had signed, denying all monetary claims, and adopting, in essence, the Respondent's previous compromise offer.[5] Accordingly, the Respondent, *inter alia*, offered reinstatement

[4]The Respondent's waiver offer was belated in the circumstances, as sec. 4(e) indicates that it should be offered prior to automatic processing. Although the record offers no explanation for this, it is established, in any event, that the Union agreed to the late offer.

[5]We affirm the judge's conclusion that deferral to the award of April 6, 1989, is inappropriate in Case 9500, but we find it necessary to rely only on the ground that there was inadequate consideration of the unfair labor practice issues pursuant to *Olin Corp.*, 268 NLRB 573 (1984). The record establishes that no evidence pertinent to the 8(a)(1) and (3) allegations, e.g., Harrington's alleged unlawful statements to the casuals, was placed in the record of the contractual proceeding, and thus the panel which determined the award was presented only with contractual issues and not with facts relevant to resolving the alleged unfair labor practices. See, e.g., *M & G Convoy*, 287 NLRB 1140, 1145 (1988); *Dick Gidron Cadillac*, 287 NLRB 1107, 1111 (1988). For the same reasons, we find no merit in the Respondent's motion for reconsideration of the Board's denial of the Respondent's prehearing summary judgment motion seeking deferral to the award.

(Footnote continued on next page.)

to the alleged discriminatees and placement on the preferential list effective April 24, 1989, and an opportunity for qualifying driver training when regular dockworker openings occurred.

B. Discussion

Case 9500's complaint alleges that the Respondent violated Section 8(a)(1) by Herrington's statements to casual employees on June 20 that they were being discharged without regard to the terms of the collective-bargaining agreement and that the Respondent would not allow the Union to dictate whom the Respondent would hire. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) on June 20 by discharging the six alleged discriminatees in order to prevent them from exercising their contractual rights to be placed on the preferential list. Finally, the complaint alleges that, about June 29, the Respondent violated Section 8(a)(3) and (1) by demanding that the six casuals sign waivers of their contractual rights as a condition of reinstatement, and by refusing to

(Footnote continued.)

Regarding our colleague's concurring opinion, we find it noteworthy that Case 9500's complaint allegations charged unlawful discrimination under Sec. 8(a)(3) and unlawful interference with protected rights under Sec. 8(a)(1). Although our final disposition of these issues is premised on the finding that the Respondent acted solely on the basis of a reasonable and arguably correct interpretation of the relevant contractual provision, the pivotal 8(a)(3) and (1) issues in the complaint involved whether the Respondent's conduct was otherwise unlawfully or discriminatorily motivated. This question of motive, independent of any contract interpretation question, is most starkly revealed in the 8(a)(1) allegation that Respondent's Herrington told employees they were being discharged *without regard to the terms of the collective-bargaining agreement*, an allegation which directly affected the 8(a)(3) issue. In view of this, and the absence of any indication that the arbitration panel was presented with any factual issues raised by the complaint allegations, we find no basis for concluding that there was adequate arbitral consideration of the statutory issues before us.

reinstate them until April 1989 because they declined to sign the proffered waivers.[6]

The judge, in conclusions at variance with the complaint allegations and his own factual findings, determined that on June 20 Herrington told the alleged discriminatees that they were being discharged because they had refused to sign waivers of their contractual rights to be placed on the preferential list, thus violating Section 8(a)(1), and that they were in fact discharged in violation of Section 8(a)(3) and (1) because they refused to sign such waivers.[7] The judge further found that on June 29 and thereafter, the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate the casuals unless they signed waivers.

With respect to the judge's 8(a)(1) finding, it is clear from the record that on or about June 20 neither Herrington nor any other agent of the Respondent told the casuals that they were being discharged for refusing to sign waivers of their contractual rights. The matter of waivers, discussed below, did not arise until June 29. Further, there is no other evidence concerning Herrington's discussions with the casuals on June 20 that establishes an 8(a)(1) violation, as alleged in the complaint or otherwise. The context for his various statements was the dispute between the Respondent and the Union over the meaning of section 4(e), i.e., he was explaining the termination letters received by the casuals in light of the Respondent's view of its obligations under section 4(e)—a tenable view, as noted below—and he was also rejecting the Union's contrary position. In these circum-

[6]No 8(a)(5) allegation was made in the complaint, and the Union is not a party to this proceeding.

[7]In his posthearing brief, the General Counsel, abandoning the specific 8(a)(3) and (1) complaint allegations, urged this unlawful waiver theory concerning the Respondent's June 20 conduct.

stances, Herrington's statement that the reason for the terminations was that the Respondent was not going to have a preferential list was as likely a reference to the fact that none of the time-eligible casuals was driver qualified—thus providing no basis for a list—as it was an arguable interference with employees' statutory rights. His statements critical of the Union—that the Union would not dictate hiring decisions to the Respondent, that the discharges were the Union's fault—and his expression of dislike for the preferential hiring procedure, may be reasonably taken as a response to the Union's opposing interpretation of section 4(e) and the ramifications of the Union's position, which, in the Respondent's view, amounted to a contractually unwarranted interference in its training and hiring decisions with respect to jobs that entailed driving tractor-trailer rigs. Any possible inference that the hostility expressed by Herrington was attributable to animus against employees for exercising statutory rights is outweighed by Herrington's statements regarding the Respondent's reluctance to let the casuals go, the concern the Respondent felt at the prospect of putting employees not qualified to drive on a preferred list for regular dockworker employment, and the Respondent's obligation to comply with the contract as it interpreted it. Accordingly, there is sufficient ambiguity in Herrington's statements for us to conclude that the evidence does not establish a violation of Section 8(a)(1).

Further, regarding the specific complaint allegation that the Respondent discharged the casuals in order to prevent them from asserting contractual rights concerning the preferential list, the General Counsel made no evidentiary showing, and after the hearing did not contend before the judge, that this was the Respondent's motive in discharging the

casuals.[8] More generally, there is on this record a noticeable absence of any protected activity on the casual dockworkers' part that would provide a conceivable basis for finding that the Respondent unlawfully terminated them on June 20. As of that date, none had invoked any perceived right under section 4(e) or other parts of the collective-bargaining agreement, nor had any declined to sign the waiver provided for in section 4(e). Further, there is no other evidence that they had exercised rights protected under the Act. More significant, with respect to the Respondent's motive, the evidence points plainly to the fact that the Respondent's conduct was driven by its understanding of section 4(e). We find that the Respondent's perception of this contract language—specifically the obligation to discharge time-qualified casual dockworkers who did not meet the qualifications and standards for regular dockworker employment—is a nondiscriminatory, reasonable, and arguably correct interpretation of the agreement. See, e.g., *Texaco, Inc.*, 285 NLRB 241, 246 (1987); see also *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3d Cir. 1981). Accordingly, the 8(a)(3) and (1) allegations concerning the Respondent's discharge of the alleged discriminatees are without merit.

By June 29, the alleged discriminatees were engaged in protected, concerted activity—participation in a grievance addressing both their discharges and an appropriate rendition of their contractual rights concerning the preferential list. See, e.g., *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). At that time, Herrington offered to reinstate them to their previous casual employee status if they would agree to the waiver procedure set forth in the second paragraph of section 4(e).

[8]See fn. 7, *supra*.

Although there are situations in which an employer may be found to have engaged in unlawful retaliation against an employee because of his exercise of contractual rights, such is not the case here. As in the case of the alleged discriminatory conduct on June 20, we find no evidence here that the Respondent's conduct in offering the contractual waiver procedure to the casuals was unlawfully motivated, i.e., a matter of retaliation for the employees' engaging in protected activity. Rather, it is apparent that the Respondent was motivated by its interpretation of section 4(e)—specifically, the provision of an alternative procedure that would exempt casual employees from the discharge mechanism in section 4(e), and thus allow for their reinstatement. Implicit in this view was that failure to opt for the waiver alternative required that their terminations pursuant to section 4(e) remain in effect. We find that the Respondent's waiver offer as a method for the discharged casuals to return to their jobs was based on a nondiscriminatory, reasonable, and arguably correct interpretation of section 4(e). See, e.g., *Texaco, supra*. With this motivation established, we conclude that the Respondent's waiver offer and its refusal to reinstate the casuals in the absence of a signed waiver did not violate the Act.

For the foregoing reasons, the unfair labor practice allegations of Case 9500 are dismissed.

II. Case 9916

Alleged discriminatee Michael Manso and another discharged casual dockworker filed an unfair labor practice charge on November 21, 1988, concerning the terminations in Case 9500; they amended the charge twice, on November 28 and December 8, 1988. Manso also participated with the

other discharged casuals in the contractual grievance concerning their discharges and their rights under section 4(e). As set forth above, following resolution of that grievance, Manso and other discharged casuals were offered placement on the preferential list effective April 24, 1989.[9]

Soon thereafter, Manso returned to work, now a "preferential casual dockworker."[10] As more fully detailed in the judge's decision, not long after his return, three of the Respondent's supervisory officials made statements to Manso indicating that the Respondent was seeking to retaliate against him because of his protected activity. On June 19, less than 2 months after his return, Manso was discharged, ostensibly for a second failure to respond to a work call—grounds for discharge under a newly instituted disciplinary policy for preferential casuals. He was subsequently reinstated without backpay pursuant to the contractual grievance procedure. We affirm the judge's findings and conclusions, fully set forth in his decision, that the supervisors' threatening statements and the Respondent's June 19 discharge of Manso violated Section 8(a)(4), (3), and (1).[11]

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[9]All dates in this section of the decision are in 1989 unless otherwise noted.

[10]At this point the Respondent had three dockworker classifications: those on the regular seniority list, nonpreferential casuals, and preferential casuals.

[11]In affirming this unlawful discharge, we rely particularly on the threatening statements made to Manso and the refusal of the Respondent's supervisor on June 19 to allow the "verifying" employee to redial Manso's telephone number, thereby bringing about Manso's second "failure" to respond to a work call, the purported grounds for his discharge.

We find it unnecessary to rely on the judge's apparent finding that the nature of the Respondent's work call policy contributed to the unlawfulness of Manso's discharge on June 19. To the extent that the judge appeared to find the call policy and related disciplinary matters discriminatory against the preferential casual dockworkers as a class, we note the absence of any pertinent complaint allegations and accordingly we decline to pass on the issue. See our further discussion of the Respondent's disciplinary policies concerning the preferential casuals below.

On August 11, Manso was 4 minutes late for work, and he received a disciplinary warning letter. This was the first time Manso had been late for work. On August 17, Manso was again late for work, this time by almost an hour. As more fully set forth by the judge, he told management officials, in essence, that his car had broken down on the highway, and in the ensuing scramble to get to work, he was stopped by the police for speeding. The Respondent checked his story and ascertained that it was largely a fabrication. By letter dated August 21, Manso was discharged on grounds of tardiness.

Operations Manager Ed Fultz, who signed the discharge letter, made clear in his testimony that Manso was not discharged because of his dishonesty; his lie established only that he did not have a legitimate excuse for the August 17 lateness. Fultz testified that he was discharged under a newly instituted tardiness policy for preferential casual dockworkers: two incidents of lateness result in discharge.

With respect to the Respondent's disciplinary policies and procedures in general, the Respondent's corporate vice president for industrial relations, Howard Johnson, whose responsibility encompassed employee disciplinary policies, testified that no disciplinary rules were ever posted for employees and that there was no uniform disciplinary policy covering dockworkers. More specifically concerning the Albuquerque terminal, Fultz testified that the lateness policy developed for preferential casuals did not apply to regular dockworkers or to nonpreferential casual dockworkers.[12] He also stated that a preferential casual's tardiness had no more or different effect

[12]Testimony and exhibits support the fact that other dockworkers were subject to a less stringent lateness policy, i.e., multiple latenesses resulted in warning letters and then suspensions, at worst, not discharge

We find no merit in the Respondent's exception to the judge's admission of these exhibits. The judge correctly overruled the Respondent's objection at the hearing, finding that the documents at issue were relevant to the alleged unlawful discharge of Manso.

on the operation of the terminal than that of other dockworkers.

According to Fultz, when Manso was late on August 11, it was the first time a preferential casual—a classification that had been in existence only a few months—had been tardy, and there was no specific lateness policy for preferential casuals at that time. In fact, when Manso inquired concerning the consequences for further tardiness, Fultz told him that although he should expect the worst, a policy had not yet been determined. Then, after consultation with the terminal manager and the corporate labor relations department, it was decided that preferential casuals would be discharged if they incurred two latenesses; thus, there would be a warning letter after the first tardiness, and discharge after the second, pursuant to the minimum disciplinary procedures under the collective-bargaining agreement. This reflected, according to Fultz, a strict disciplinary attitude toward preferential casuals as a general theme, because they constituted a new job classification. This policy was decided when the preferential list was established in April.

Fultz further testified that the new lateness policy corresponded with a distinct disciplinary policy that the Respondent had established previously for preferential casuals concerning failure to respond to work calls. In that matter, the Respondent had decided not long after the preferential list was effected that the first failure to respond to a work call would draw a warning letter and the second would result in discharge. Fultz noted that the earlier policy was implemented only after the preferential casuals were given written notification of the Respondent's workshift starting times, thus making clear when the preferential casuals must be available. The record otherwise establishes that, following its implementation, several preferential casuals were discharged under the "two-call" policy.

The judge concluded that because of Manso's dishonesty concerning his explanation for being late on August 17, the Respondent had discharged him for cause and not in violation of the Act. This is a plainly erroneous factual statement of the Respondent's asserted reasons and we reverse it. Fultz's testimony establishes that Manso's false explanation meant that his August 17 tardiness was not an excusable tardiness, and so he was charged with a second lateness—sufficient, in the Respondent's view, for termination. The Respondent provided no evidence that it had treated Manso's dishonesty in and of itself as an independent basis for discharge or any other disciplinary action.[13] Cf., e.g., *Vilter Mfg. Corp.*, 271 NLRB 1544, 1546-1547 (1984), in which the employer established that an employee's dishonesty was a basis under its policies for refusing reinstatement regardless of the employee's protected activities.

In the circumstances of this case, the unlawful statements by the Respondent's supervisors threatening retaliation when Manso first returned to work as a preferential casual and his unlawful discharge on June 19 provide strong evidence of the Respondent's unlawful motivation regarding Manso's August 21 discharge. Thus, just 2 months after his unlawful discharge for grievance activity and filing an unfair labor practice charge, the dischargee, having been reinstated through the grievance procedure, is again discharged, assertedly pursuant to a lateness policy which has just been instituted and of which Manso is the first violator. Further, the evidence shows that the Respondent's dockworkers who are not on the preferential list and who, it is reasonable to

[13]We, of course, do not suggest that giving dishonest excuses for lateness cannot be a legitimate ground for discharge or other disciplinary action. We are simply seeking to determine whether the Respondent *did* discharge Manso for this reason and would have done so even if he had not filed unfair labor practice charges and grievances.

infer, perform work similar to that done by preferential casuals, are treated less strictly concerning tardiness than was Manso, in a work situation where the lateness of a preferential casual has no more impact on the operation of the Respondent's facility than that of the other dockworkers. In view of the above, we find that the General Counsel has provided a sufficient prima facie showing of an unlawful discriminatory discharge under *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981).

The Respondent's burden, in the face of this prima facie case, was to show that it would have taken the same action against Manso even if he had not been engaged in activities protected by the Act. The essence of its asserted defense is that Manso was treated evenhandedly and nondiscriminatorily, pursuant to a disciplinary framework that had previously been developed for the preferential casuals. According to Fultz, a general decision was made at the time the preferential list was put into effect to apply strict disciplinary measures with respect to the preferential casuals, pursuant to no more than the minimum safeguards in the collective-bargaining agreement, because it was a new job classification. A work-call policy was implemented pursuant to this view: preferential casuals were issued warning letters the first time and discharged the second time they failed to respond to a call. The Respondent asserts that the lateness policy for preferential casuals initiated in response to Manso's tardiness, was no more than a routine decision within a disciplinary form already established. When Manso was discharged for a second lateness, according to the Respondent, he was treated similarly to other preferential casuals discharged for a second failure-to-respond under the work-call policy, and not differently than any other preferential casual would have been treated for a second lateness.

The Respondent's disciplinary approach toward the preferential casuals—strict discipline simply because they constituted a new classification—and its lack of uniform disciplinary policies and published rules applicable to all dockworkers raise more questions than they resolve in the context of a defense to an alleged discriminatory discharge. However, we have found it unnecessary to pass on the lawfulness of the Respondent's work-call policy and related disciplinary matters as they affected the class of preferential casuals, see footnote 11, *supra*. In any event, assuming, without finding, the nondiscriminatory character of the Respondent's general disciplinary view and the work-call policy for preferential casuals, and further assuming *arguendo* the consequent legitimacy of the lateness policy in itself, it is apparent that the Respondent's treatment of Manso under the lateness policy was not consistent with its previous conduct within the disciplinary framework for preferential casuals. Fultz testified that preferential casuals accumulated failure-to-respond incidents only after the work-call policy was implemented; a prior failure-to-respond was not held against them. Thus, this policy was applied prospectively, not retroactively. Fultz testified that the lateness policy was not determined until after Manso's August 11 tardiness. He was subsequently discharged because of the August 11 and 17 lateness incidents. However, only the one on August 17 occurred after the policy was instituted. In Manso's situation, the lateness policy was applied retroactively to include the August 11 lateness, distinct from the Respondent's application of the work-call policy. Accordingly, even assuming the validity of its disciplinary treatment of preferential casuals in general, the Respondent has not established that Manso was treated the same way that other preferential casuals would have been treated in similar circumstances.

We conclude that the Respondent has failed to rebut the General Counsel's prima facie case, i.e., that Manso's discharge was unlawfully motivated. Taking account of the General Counsel's case, it is apparent, and we find, that Manso's tardiness on August 17 was seized upon by the Respondent as a pretext to discharge him again and for the same unlawful reasons it discharged him on June 19. Manso's August 21 discharge violated Section 8(a)(4), (3), and (1), and we will issue an order accordingly.

Amended Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(4), (3), and (1) of the Act, we shall order it to cease and desist and to post an appropriate notice.

With respect to affirmative relief, we shall order that the Respondent make Michael Manso whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge on June 19, 1989, from that date until the date of his subsequent reinstatement. We shall further order the Respondent to offer Manso full and immediate reinstatement to his job as a preferential casual dockworker and to make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge on August 21, 1989. Interest will be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and backpay will be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

ORDER

The National Labor Relations Board orders that the Respondent, ABF Freight System, Inc., Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge because they have filed charges under the Act or because they have filed grievances under the provisions of a collective-bargaining agreement.

(b) Discharging employees or otherwise discriminating against them because they have filed charges under the Act, or because they have engaged in union or other protected, concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Manso immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered due to the discrimination against him, in the manner set forth in the amended remedy section of this Decision.

(b) Remove from its files any reference to Michael Manso's unlawful discharges and notify him in writing that this has been done and that the discharges will not be used against him in any way.

(c) Preserve and, on request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay dues under the terms of this Order.

(d) Post at its Albuquerque, New Mexico facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[14]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 1991

JAMES N. STEPHENS, Chairman

DENNIS M. DEVANEY, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER CRACRAFT, concurring.

I agree with my colleagues' decision in all respects except that in Case 28—CA—9500 I would defer to the arbitration award under the standards set forth in *Olin Corp.*, 268 NLRB 573 (1984).

There is no dispute that the arbitration proceeding was fair and regular, and all parties had agreed to be bound. The next question is whether the arbitration panel adequately considered the unfair labor practice issue. The Board will find that the arbitrator adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin, supra*, 268 NLRB at 574.

I recognize that the precise 8(a)(1) and (3) allegations of the complaint were not presented to the arbitration panel, but I find that the contractual issue resolved by the panel was factually parallel to the unfair labor practice issue. The contractual issue, as phrased by the Union, was whether the Respondent's treatment of the casuals violated section 4(e) of the contract. The unfair labor practice issue, as phrased by the majority, is whether the Respondent's conduct was based on a reasonable and arguably correct interpretation of section 4(e). Central to both issues is the meaning of the contractual provision. In the course of resolving the contractual issue, the arbitration panel did not entirely agree with the position of the Union or the Respondent, but adopted a middle view that incorporated elements of the positions of both parties. Therefore, I believe that implicit in the award is a determination that both parties' positions were reasonable. Thus, I would find that the arbitration panel decided the contractual issue in such a way as to effectively resolve the unfair labor practice issue.

As to whether the parties generally presented the arbitration panel with facts relevant to the statutory issue, the record shows that the panel received ample evidence. That certain evidence (i.e., Operations Manager Herrington's statements to the casuals) was not presented to the panel does not defeat a finding that the panel was generally presented with the facts relevant to the statutory issue. See my concurring opinion in *Haddon Craftsmen,* 300 NLRB No. 100 (Nov. 30, 1990).

Finally, contrary to the General Counsel's contention, I would find that the award is not clearly repugnant to the Act. In this connection, I note that the panel's failure to award backpay does not, standing alone, render the award clearly repugnant. See, e.g., *Crown Zellerbach Corp.,* 215 NLRB 385, 387 (1974).

In sum, the General Counsel has failed to show any defects in the arbitration award that warrant failure to defer. On this basis, I join my colleagues in dismissing the unfair labor practice allegations in Case 28—CA—9500.

Dated, Washington, D.C. August 27, 1991

MARY MILLER CRACRAFT, Member
NATIONAL LABOR RELATIONS
BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutural aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with discharge because they have filed charges under the National Labor Relations Act or because they have filed grievances under the provisions of a collective-bargaining agreement.

WE WILL NOT discharge employees or otherwise discriminate against them because they have filed charges under the National Labor Relations Act or because they have engaged in union or other protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Michael Manso immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his unlawful discharges, with interest.

WE WILL notify him that we have removed from our files any reference to his unlawful discharges and that the discharges will not be used against him in any way.

ABF FREIGHT SYSTEM, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 234 North Central Avenue, Suite 440, Phoenix, Arizona 85004-2212, Telephone 602—261—3188.

JD—55—90
Albuquerque, NM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ABF FREIGHT SYSTEM, INC.

and

MICHAEL MANSO, An Individual

and

ANDY TRUJILLO, An Individual

Cases Nos. 28—CA—9500 and 28—CA—9916

Lewis S. Harris, Esq., of Albuquerque, New Mexico, for the General Counsel.

John V. Jansonius, Esq., of Dallas, Texas, for the Respondent.

DECISION

I. Findings of Fact

A. Statement of the Case

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before the undersigned upon two unfair labor practice complaints,[1] issued by the Director or the Acting Director of the Board's Twenty-Eighth Region and consolidated for hearing, which allege that Respondent ABF Freight System, Inc.,[2] violated Sections 8(a)(1), (3), and (4) of the Act. More particularly, the two complaints allege that the Respondent threatened casual dock workers

[1]The principal docket entries in this case are as follows:

Charge filed by Michael Manso and Andy Trujillo, two individuals, against the Respondent in Case No. 28—CA—9500 on November 21, 1988, and amended on November 28, 1988, and again on December 8, 1988; Complaint issued against the Respondent in Case No. 28—CA—9500 by the Acting Director of Region 28 on September 21, 1989; Respondent's Answer filed on November 3, 1989; Charge filed by Michael Manso, an individual, against the Respondent in Case No. 28—CA—9916 on September 1, 1989; Complaint issued against the Respondent in Case No. 28—CA—9916 by the Director of Region 28 on October 13, 1989, and consolidated with the Complaint in Case No. 28—CA—9500 on the same day; Respondent's Answer filed on October 26, 1989; Respondent's First Amended Answer to both complaints filed on December 15, 1989; Respondent's Second Amended Answer filed on January 6, 1990; Hearing held in Albuquerque, New Mexico, on January 9 and 10, 1990; Briefs filed with the undersigned by the General Counsel and the Respondent on or before February 12, 1990. The Respondent also filed a reply brief in this case. There is no provision under the Board's Rules and Regulations for the filing of a reply brief with an administrative law judge. Accordingly, that brief will be stricken and its contents will be disregarded.

[2]Respondent admits, and I find, that it is a Delaware corporation. It is engaged in the interstate transportation of freight and maintains a terminal for that purpose at Albuquerque, New Mexico. During the preceding
(Footnote continued on next page.)

employed at its Albuquerque terminal with discharge in violation of an outstanding collective bargaining agreement and then discharged six casual employees on or about June 20, 1988, because they refused to sign waivers of their rights under the existing collective bargaining agreement. The complaints also allege that, after these individuals were reinstated to their former positions, discriminatee Michael Manso, one of the previously discharged casuals, was threatened by several supervisors that the Respondent would retaliate against him for filing a grievance and for filing an unfair labor practice charge. The complaints also allege that, on two different occasions, the Respondent discharged Manso in reprisal for such conduct. The Respondent asserts that the first series of incidents, which were the subject of a grievance and arbitration proceeding, should not be relitigated in a Board proceeding and that the Board should defer to the award of the arbitration panel. It further asserts that the Respondent took the actions it did respecting six casual dock workers because it was obligated to do so by the terms of its collective bargaining agreement, not because of any desire to punish them for asserting their contractual rights. Respondent denies that its supervisors threatened any employees and asserts that Manso was discharged for violating company rules regarding tardiness and making

(Footnote continued.)
twelve-month period, the Respondent, in the course and conduct of the aforesaid business, derived gross revenues from the transportation of freight and other commodities from the State of New Mexico directly to points and places located outside the State of New Mexico valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act. Local 492, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Union) is a labor organization within the meaning of Section 2(5) of the Act.

oneself available to respond to work calls. Upon these contentions the issues herein were joined.[3]

B. The Unfair Labor Practices Alleged

Respondent operates a large motor freight business throughout the United States and, through membership in a multi-employer association, is a party to the Teamsters National Motor Freight Agreement. Included in its operation are about 150 truck terminals in the western United States. Through membership in a regional multi-employer association, the Respondent is also a party to the Western States Area Agreement, which contains a supplemental agreement covering local cartage and dockworkers. One of the Respondent's large western facilities is a break bulk terminal at Albuquerque, New Mexico, where it employs approximately one hundred dockworkers. They are engaged not only in loading and unloading freight originating in or destined for Albuquerque but also in breaking down and reshipping freight passing through that area destined for other locations.

Most of the Respondent's Albuquerque dockworkers are on its regular seniority list and are entitled to select shifts based upon their date of permanent hire.[4] Because its daily demand for dockworker employees fluctuates, some 15% of those on the regular dockworker seniority list are employed

[3]The transcript herein is hereby corrected as follows:

1. On page 42, line 22, change "would bow to" to "The Board would"

2. On page 514, line 15, delete "no"

[4]The Respondent operates its Albuquerque facility on a twenty-four hour, seven-day week basis, and has five overlapping eight-hour shifts, which begin at midnight, 5 a.m., 8:30 a.m., 3:30 p.m. and 5 p.m.

on an on-call basis. While they are assured of a forty-hour workweek, the so-called "fifteen percenters" do not work fixed shifts and must remain available for calls as needed. They are guaranteed a break of at least sixteen hours between shifts and need not remain available for call after working forty hours in any given week.

In addition, the Respondent employs casual dockworker employees, who are employed from time to time on eight-hour shifts and who must make themselves available for assignment in much the same manner as a regular "fifteen percenter." However, a casual has no standing under the contract as an employee and is not guaranteed any particular amount of employment. He may work forty hours one week and eight hours or no hours the next week. The Respondent may discontinue a casual employee by the simple stratagem of not calling him to work. While there may be some inconsistency in the record, it appears that regular casual employees have no standing under the grievance and arbitration machinery[5] and have different health benefit costs because they may not work the full forty hours in a month necessary to entitle an employee to health benefits. At least at one time, regular casuals did not receive premium pay for holiday work. Respondent employs casuals in any significant numbers only at its Albuquerque and Los Angeles terminals.

[5]Respondent's witnesses testified that regular casuals have no contractual right to file grievances. There is certainly nothing in the contract which clearly confers such a right on regular casuals, as distinguished from preferential casuals. In the arbitration award which is at issue in this case, the Respondent interposed an objection at the first stage of the grievance procedure that the casuals who were the subject of the grievance had no standing to complain. Notwithstanding this objection, the grievants did obtain substantial relief in the final award. In this proceeding, where it served the Respondent's purpose to admit that regular casuals have standing to complain under the grievance procedure, the Respondent took two opposite positions on this point in the course of a five-minute colloquy.

As a result of this practice, the Respondent's terminal at Albuquerque enjoyed a hiring arrangement under which it could tailor its work force to the ebb and flow of daily traffic without incurring any permanent responsibility to a large group of needed employees. Since regular casuals did not, and still do not, enjoy seniority, the Respondent could call some of these individuals to work at random while ignoring others; it had no obligation whatsoever to hire any casual if and when vacancies occurred among its cadre of regular dockworkers, regardless of how long the casual might have worked for the Respondent. If a likely prospect for a dockworker job appeared at the employment office, he could be hired for a permanent position in preference to a casual employee who might have been on call and on the payroll for years. The presence of a large number of experienced casuals to supplement its regular complement of employees meant that the Respondent had available a possible source of qualified replacements in the event of a strike.

The 1988 Western States Area Agreement put a substantial crimp in this practice. The local cartage and dock worker supplement to this Agreement introduced a new concept, namely that of a preferred casual, who was given a standing not previously accorded to anyone who was not on the regular seniority list. Art. 60, See. 4, of the 1988 contract provides:

> (e) Any casual or non-seniority owner-driver used by the Employer for seventy (70) eight (8) hour shifts within six (6) consecutive months, shall be automatically processed by the Employer to determine whether the casual meets the Employer's hiring standards and qualifications. Such processing shall be completed within thirty (30) calendar days of the last day of the seventieth (70) shift.

> Automatic processing may be waived with a written agreement between the individual, the Local Union, and the Employer.
>
> After such processing, if the casual employee meets the Employer's hiring standards and qualifications for regular employment, he/she shall be placed on a preferential hiring list for future regular employment and shall be selected for regular employment in the order in which he/she was placed on the preferential hiring list and he/she shall not be subject to any probationary period. His/her seniority date will be the date he/she is put on the seniority list. Failure of the employer to add casuals from the preferential hiring list in this order shall subject the Employer to a runaround claim.
>
> Casual employees who are placed on the preferential hiring list and who meet the Employer's hiring standards and qualifications for regular employment shall have regular monthly health and welfare contributions paid by the Employer on their behalf as set forth in Article 52, Section 1, Health and Welfare, the month following the month such casual first becomes eligible for regular employment. Such contributions shall continue to be paid by the Employer each month thereafter provided the preferential casual satisfies the forty (40) hour eligibility requirement provided in Article 52. Preferential casuals who qualify for regular health and welfare contributions shall also be eligible for regular health and welfare benefits each month a regular contribution is paid by the Employer on their behalf.
>
> If the casual employee does not meet the Employer's hiring standards and qualifications or refuses to accept regular employment while on the

preferential hiring list, the casual and the Local Union shall be so notified in writing and his/her use as a casual will be discontinued.

Casual employees on the preferential hiring list shall be offered available extra work in seniority order by classification, as among themselves. The Employer shall not be obligated to make more than one (1) call per casual per day and such call need not be verified. However, abuse of this procedure will be subject to the grievance procedure. Further, casuals on the preferential hiring list shall have access to the grievance procedure in the event of disciplinary action.

When an Employer utilizes eight (8) hour supplemental casuals thirty (30) or more days in any two (2) consecutive calendar months, the Employer shall add one (1) regular employee from the preferential hiring list.

Hence, under the new procedure, the Respondent could no longer use the services of a casual on an indefinite basis. After 70 shifts, a casual had to be placed on the preferential list and, whenever vacancies arose in the regular list, preferential casuals had the right, if qualified, to be hired on a permanent basis. The Respondent was no longer able to hire directly off the street in preference to hiring a long-time casual employee and, to prevent evasion of the meaning and intent of the new provision, a formula was devised to determine when vacancies might exist on the regular dockworker roster which the employer was obligated to fill from the preferential list. To back up the standing of an aspiring dockworker, preferential casuals were given explicit standing to invoke the grievance and arbitration machinery of the contract if subjected to company discipline.

In the spring of 1988, the National Master Freight Agreement between the Teamsters International and, *inter alia*, the Respondent in this case was ratified.[6] Around April 1, 1988, Union Business Agent Gus Trujillo and Union Secretary-Treasurer Ralph Chavez met with Albuquerque Terminal Manager Mike Long, Respondent's Regional Vice-President Sid Hatfield, and Albuquerque Operations Manager Robert Herrington to discuss the question of preferential casuals which had been inserted in the new Western States Area Agreement. The Union took the position that everyone who had completed seventy shifts as a casual employee should be automatically put on the preferential casual list. The Respondent objected, claiming that many of the casual dockworkers were not qualified to be regular dockworkers because they were not also qualified as city drivers. The Union argued that, in the past, the Respondent had permitted casual dockworkers to learn how to drive by operating Company trucks on their own time in the terminal yard. Hatfield said that this would be unacceptable and that casuals would not be allowed to obtain driver experience while on the preferential list. The only time the Company would train a casual was when an opening arose on its list of regular dockworkers. He insisted that any casuals who refused to sign waivers of their right to be placed on the preferential list after working seventy shifts would be fired. I credit Trujillo's testimony that he would not agree to the discharge of any casual employees and to his further statement that he would file a grievance if any casuals were discharged because they refused to sign waivers.

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[6]Actually, 63% of the national membership of the Teamsters voted to reject the contract. However, since the Constitution of the International requires a 2/3rds vote to reject a contract which has been submitted for ratification, the contract in question was deemed approved.

On May 20, 1988, Western Motor Carriers, Inc., the employer association which bargains for the Respondent and other carriers with respect to matters pertaining particularly to western motor carriers, sent its members a letter instructing them that the settlement was retroactive to April 1, 1988, with respect to monetary items and would take effect on May 29, 1988, with respect to non-monetary items, which included the new provisions relating to preferential casual employees at issue in this case. It also informed member employers that they had thirty days, dating from May 29, in which to process casual employees eligible for preferential listing. The letter stated:

> If you do not terminate such casuals prior to the end of the 30-day period from May 29, 1988, such casuals will be placed on the appropriate preferential hiring list and will be considered eligible for future hire as regulars as well as for call for available daily casual work.

Thereafter the Respondent reviewed the personnel records at its Albuquerque terminal and determined that twelve individuals had met the seventy shift requirement for preferential treatment. It also determined that none of them were driver-qualified, although this determination was later revised as to one dockworker. Respondent likes to be in a position to utilize dockworkers from time to time to make local pick-ups and deliveries and to act as hostlers, i.e., to drive vehicles about in the terminal yard. For this reason, it has required regular employees to be what it calls driver-qualified, namely to possess a Class 8 New Mexico driver's license, to pass U. S. Department of Transportation health and driver's examinations, and to have two years of experience in operating a tractor-trailer rig—the so-called

eighteen wheeler. Passing a course in driving tractor-trailer rigs is regarded as the equivalent of two years' experience, and, when vacancies have arisen on its regular seniority list, the Respondent has often sent candidates for regular employment to school at Company expense so they can be given qualifying training. While the Respondent's testimony would give one to believe that the driver qualification requirement has been an inflexible prerequisite for regular employment, the record reflects that the Respondent waived this requirement when it purchased two companies, Navajo and East Texas, and absorbed their dockworkers into its own work force.

On June 20, 1988, Respondent gave to all casual dockworkers whom it deemed unqualified for regular employment the following letter:

> In accordance with Article 60, Section 4(e) of the Western States Area Pickup and Delivery, Local Cartage and Dockworker Supplemental Agreement, this is to advise you that you do not meet ABF's hiring standards and qualifications for regular employment. Therefore, your name cannot be added to a preferential hiring list as referred to in the aforementioned Article and your use as a casual is being discontinued effective immediately.

The letter was signed by Mike Long.

In addition to this written communication, Robert Herrington had several conversations with the dockworkers who were being discharged. Herrington told Michael Manso when he handed him his discharge letter that Manso was being laid off because the Company was not going to have a preferential casual list. Manso asked Herrington what he

was talking about so Herrington started explaining the provisions of the new article of the contract pertaining to preferential casuals. Manso then asked Herrington if anything could be done about it, to which Herrington replied, "Not at this time." Herrington went on to repeat that the Company was not going to have a preferential list and the Union was not going to tell them whom it might hire. He went on to explain to Manso that, under the preferential casual provision of the contract, casuals would have to be hired in accordance with their standing on the preferential list and the Company simply would not have such a list.

Herrington also informed casual dockworker Jerry Miera that he would be fired. His statement to Miera was that the latter was being fired "given the situation." When Miera asked why, Herrington replied that Miera had worked seventy shifts during the preceding six months and had been processed but did not meet the Company's qualifications. Herrington then suggested that, if Miera wished to look further into the matter, he should call his union representative and possibly have that part of the contract changed so casuals could get their jobs back. Herrington also told Miera he was sorry to have to fire him because Miera had been one of the Company's better casuals.[7]

After receiving a letter from the Company informing him that he had been discharged, casual dockworker Albert Miranda phoned Herrington. Miranda had been working about 32 to 40 hours a week so he asked Herrington why the Company was taking this action. Herrington replied that the Respondent did not have a preferential hiring list. Miranda then asked Herrington why he had not been permitted to sign a waiver but Herrington gave no answer. Casual dockworker Chad Sullins was told personally by Herrington that

[7]During the weeks preceding his discharge, Manso had been working a full forty-hour week while Miera had been working overtime.

the Company was firing him because he did not meet the Company's qualifications. At that time Sullins had been working five or six days each week. Casual dockworkers Arnold Haynes and Tim Connolly were present so Herrington directed his remarks to them as well. In his testimony concerning this event, Haynes added that Herrington told these employees that they did not meet Company standards, meaning that they did not know how to drive a tractor-trailer. Haynes objected, saying that he thought that the Company was going to send casuals to driving school.[8] Herrington said he was not going to take all twelve casuals who were eligible under the contract for preferential status and send them to driving school because he did not need twelve drivers. He said that he did not want to have a preferred list and wanted to keep on working under the old arrangement. He added that he would prefer to keep on hiring people for regular slots in the way the Company had been doing rather than as the contract provided. He also told the employees present at this conversation that it was the Union's fault that they were being discharged, insisting that he really did not want to fire them because they had been good employees but the contract required him to do so and he had to comply with its provisions.

Later, after a grievance had been filed concerning the discharge of casual dockworkers, Herrington phoned Sullins and offered him an opportunity to sign a waiver of his right to be placed on the preferential list. Sullins declined. Herrington told Sullins that he did not like the idea of a preferential list because it would force him to put people from that list on the regular list. He expressed the opinion that the "end-of-the-break" terminals might benefit from

[8]Herrington had told Haynes when he was first hired that, when the Company was ready to hire a casual as a full-time driver, it would send him to driving school.

such an arrangement because they did not have many casuals, but he did not want to put anyone on the preferential list who was not driver-qualified.

On June 21, 1988, the Union filed a grievance on behalf of all twelve casual dockworkers whom the Respondent discharged. The ultimate award arising out of this grievance disposed of the discharges of the six employees named in the complaints in this case. The other discharges were settled by the parties during the pendency of the arbitration case. On June 29, 1988, the Arizona-New Mexico Joint State Committee heard the grievance at the first step in Albuquerque. According to the standard nationwide Teamster grievance procedure, the first two steps consist of hearings before panels of individuals composed of an equal number of employers and union representatives, none of whom are parties to the immediate dispute. If the first-step panel cannot resolve the grievance by majority vote, the deadlocked case is forwarded to the second step which, in this case, was the Joint Western Area Committee, composed of four employer and four union representatives. If this body deadlocks, and it did, the matter is finally referred to the National Grievance Committee in Washington, composed of the International President of the Teamsters and the Chairman of the national employer bargaining committee. In the event of a deadlock at this level, or if either party is dissatisfied with the national award, either party may resort to self help.

The first step of the grievance was heard at the Howard Johnson Motel in Albuquerque. Hatfield and Herrington spoke with a number of grievants outside the hearing room to discuss the matter at issue. Hatfield was asked why ABF was not going to have a preferential casual list. He replied that the Company did not want one, did not need one, and would hire whom it wanted when it wanted. Herrington told

the grievants who were present that they could have their jobs back immediately if they signed a waiver. Eventually five grievants—Steve Carlson, Jim Olson, Andy Turrietta, Tim Connelly, and Rick Tingley—signed waivers and returned to work. The Respondent reviewed the record of Charles Estrada a second time, determined that he was qualified as a driver, and placed him on its regular dockworker list. After the conclusion of the first-step hearing, Herrington phoned Manso, Sullins, Haynes, and Trujillo and offered to let each of them come back to work if they would sign a waiver. They all declined to do so.

Sometime after the first-step grievance committee deadlocked, Hatfield again spoke with Trujillo about resolving the grievance. Hatfield proposed that all casuals who had worked the qualifying hours set forth in the contract be placed on a preferential list but that the Respondent be under no obligation to offer them driver training until an opening arose on the regular dockworker list. Trujillo insisted that the Company provide driver training to all casuals on the preferred list, a proposal which the Respondent felt would be too costly.

The second-step grievance committee, which met in San Francisco, also deadlocked, thereby forwarding the case to the National Grievance Committee in Washington. In a letter, dated April 6, 1989, the Union and Employer members of the National Grievance Committee resolved the dispute as follows:

> Please be advised that the National Grievance Committee, on April 6, 1989, adopted a motion that, based on the transcript, this case shall be resolved in the following manner:

1. Grievants Carlson, Olson, and Estrada are removed from the grievance inasmuch as their grievances were previously resolved in a manner that is consistent with the decision in this case.

2. Waivers previously executed by several of the employees are null and void.

3. The grievants, excluding the aforementioned three (3), shall be placed on the preferential hire list in the order they completed their seventieth (70th) shift.

4. As regular positions become available, the grievants will be offered regular employment from the preferential hire list and shall not be subject to the thirty (30) day processing period.

5. Driver-qualified grievants will be immediately placed in openings as they become available. Non-qualified drivers will be offered training in ABF's driver training course as their respective openings occur. Appropriate travel and lodging expenses will be paid if training is held outside Albuquerque and they shall be compensated in accordance with ABF's regular training program.

6. If the grievant satisfactorily completes training, he shall be immediately added to the seniority list. If he refuses training or fails the course, his services shall be terminated and not used again.

7. There shall be no money claims paid as a result of this decision.

Of the five casuals who had executed waivers and who had continued to work during the pendency of the grievance, two had been sent to drivers' school and one had been placed on the regular dockworker seniority list. Immediately following the decision of the National Grievance Committee, the Respondent wrote letters to the six grievants who had not signed waivers and offered to re-employ them. The letters read:

> Pursuant to the National Grievance Committee decision in Case #N-4-89-W4, you are being placed on the preferential hiring list in the order in which you completed your 70th shift within six (6) consecutive months.
>
> Effective Monday, April 24, 1989, you will be subject to call for casual work from the preferential hiring list, in the order that your name appears on the list.
>
> As regular positions become available, you will be offered regular employment from the preferential hiring list under the following conditions:
>
> A) You shall not be subject to the thirty (30) day processing period.
>
> B) If you are driver-qualified, you will be immediately placed on the regular seniority roster as openings become available.
>
> C) If you are not driver-qualified, you will be offered training in ABF's Driver Training Course as

respective openings occur. Appropriate travel and lodging expenses will be paid to you if the training course is held outside Albuquerque, and you shall be compensated in accordance with ABF's regular training program.

D) If you satisfactorily complete driver training, you will be immediately added to the regular seniority roster. If you refuse training, or fail the training course, your services will be terminated.

Discriminatees Haynes, Manso, Sullins, and Trujillo returned to work. The others apparently did not, although there is evidence in the record that *Miranda* was on the payroll subsequent to the national decision and was removed thereafter for an attendance-related infraction.

I credit Manso's testimony that, upon his return to the dock, he was greeted with menacing statements from three supervisors. Operations supervisor (foreman) Chris Lovato told Manso that he had better watch his step because ABF was gunning for him. Manso replied that he would do so. Operations supervisor Thomas C. McNutt assured Manso that he had nothing to do with Manso's discharge. He mentioned that he noticed that Manso had been coming to work with a "pissed-off" attitude and suggested that Manso should try to work with a good attitude and things would go a lot easier. McNutt also told Manso to be careful because higher management was after him. Operations supervisor Kyle Beeson told Manso, "Well, you made it back. Let's see how long it takes them to get rid of you this time."

Upon setting up the preferential casual list, the Respondent began to implement a practice known as verification. When a foreman needed a casual dockworker to work on the following shift, he would summon a rank-and-file Teamster

member to place the call. If the preferential casual being called did not answer the phone, the Teamster was then asked to sign a written verification that a call had been placed and that no response was forthcoming, whereupon disciplinary action could be taken for failing to "protect one's shift." A second instance of failing to respond to a call authorized the Company to remove an employee from the preferential casual list and to discharge him.

On May 8, less than a month after his return to work, Manso was given a warning letter for failing to protect his shift, i.e., failing to be available for a call to work which was placed on May 6. On June 19, he received a letter discharging him for again failing to protect his shift, i.e., not being home to receive a call at 5:51 a.m. on that date. The call was verified by a regular dockworker employee, Jeff Motter. Manso grieved the discharge and was reinstated at the first step of the grievance procedure but without pay. At the hearing in this case, Jeft Motter credibly testified that, between 5 a.m. and 6 a.m. on June 19, Supervisor Ronald S. Ford asked him to verify phone calls that were being made to summon casuals to work for the following shift, which was scheduled to begin at 8:30 a.m. Motter said that he was quite tired and thought that he had misdialed Manso's number. When no one answered the call, Motter told Ford that he thought that he might have dialed the wrong number and asked permission to dial it again. Ford would not let him do so and insisted that Motter sign the call verification form. Motter became very angry and told Ford that he did not want to verify any more phone calls placed to casuals.

On August 11, Manso was given a warning letter for coming to work four minutes late on the 5 a.m. shift. On August 17, Manso was again late to work on the 5 a.m. shift. On this occasion, he did not arrive until almost 6 a.m. According to Manso, he was driving to work along I-40

when his car overheated, so he had to pull over and park by the side of the highway. He found a phone booth near an abandoned filling station and phoned the terminal. There is no dispute that he phoned in about 5:25 a.m. to say he had trouble. Then, according to Manso, he phoned his wife, who drove quickly to the site of the phone booth in her car to pick him up. Manso then drove her car back onto I-40 and headed for the terminal with her, whereupon he was pulled over by Bernalillo County deputy sheriff Derryl Smith for speeding. Officer Smith issued only a warning and permitted Manso to proceed on his way.

When Manso arrived at work, he was closely questioned by supervisors concerning his story. When asked what time he left home, he became evasive and insisted that the answer to that question was irrelevant. The plant manager then drove to the spot on I-40 where Manso said he had parked his overheated vehicle and could find nothing. The Company pursued its investigation of this event by questioning Officer Smith and getting a statement from him. Based upon its investigation, the Respondent concluded that Manso was falsifying the reason for his tardiness so it discharged him for coming to work late on two different occasions. Manso grieved this discharge but lost at the first-step hearing and did not pursue his grievance any further. In testimony before the Board, Officer Smith did not corroborate Manso's story, testifying that, when he pulled Manso over on I-40 to issue a warning for excessive speed, there was no one with Manso in his vehicle.

C. Analysis and Conclusions

The establishment of a preferential casual list for dockworkers by Article 60 of the 1988 Western States Area Agreement threatened to bring about a small revolution in

the hiring practices at the Respondent's Albuquerque terminal. Before this time, the Respondent was able to keep down its costs and to assure maximum flexibility and minimum liability in its dock operation by supplementing its regular complement of employees with a pool of extra workers who could be hired and fired at will and who, if they wanted to remain on the Respondent's list, and to forego other employment opportunities and make themselves available for call without any obligation on the part of the Respondent to call them. Now the contract made casual employment on the dock a recognized first step on a career ladder and laid out well defined points along the way at which the Respondent must accord improved status to any dockworker who continues to make himself available for hire.

Respondent's witnesses to the contrary notwithstanding, it enjoyed the best of all possible worlds with the regular casual system and it was loath to abandon it. I flatly discredit the self-serving testimony of Hatfield, Herrington, Fultz, Johnson, and possibly others that the Respondent applauded the institution of the preferential casual system in the 1988 contract and regarded it as a boon to its operation. If the Respondent had regarded preferential listing of casual dockworkers as enthusiastically as its testimony would have the Board believe, the Respondent could have unilaterally instituted this system without seeking the approval of anyone many years ago and enjoyed the many benefits it says the system now has brought about. However, Respondent did nothing of the sort until it was forced to do so, not merely by contract but also by a National Grievance Committee award forcing it to comply with the plain language of that contract. Even so, and at this late date some two years following the adoption of Article 60 not one casual dockworker at the Albuquerque terminal has made it from the preferential list to the regular dockworker seniority list,

despite the fact that at least three regular dockworkers in a work force of one hundred have resigned or retired during that same period. Respondent has been fighting a last ditch effort to avoid the implementation of the preferential list requirement of Article 60 of the Western States contract at its Albuquerque terminal and the positions taken by it in this case are simply a part of that effort.

Herrington explained to several casuals at the time of their termination in June or 1988 what the Company's feeling was concerning preferential listing and why it felt the way it did. I credit testimony that he said that the Respondent much preferred to keep on operating its dock the way it had been doing—using a list of regular seniority employees supplemented by a group of extras who had no standing under the contract even to file a grievance in the event of being shortchanged or otherwise mistreated. Herrington was quite emphatic in his opposition to preferential listing of casuals: the Company was not going to let the Union tell it whom it was going to hire and when it was going to hire anyone. When the Respondent was forced to implement the provisions of Article 60, it was willing to discharge several experienced dockworkers—men who admittedly had been doing a good job and who were working full work weeks in casual status—rather than forego its traditional way of manning the facility. The only alternatives presented to all casuals were to waive their contractual rights or be discharged. This was told to them a second time by Herrington and Hatfield a few days later, just before the Arizona-New Mexico Joint States Grievance Committee began to hear their case at the first step. Some casuals accepted the Respondent's terms, signed waivers, and were put back to work. Six did not and were out of work for nearly a year until the National Grievance Committee directed the Respondent to put them back to work.

Even at that point, the Respondent did not relinquish its effort to avoid the full impact of Article 60. Without bothering to notify the Union or to bargain with it, the Respondent instituted toward preferential casuals a practice or policy that was at a variance with, and more stringent than, the practice it had been following with respect to other dockworkers. So-called "fifteen percenters" were and are called twice, and only on the second call is any effort made to verify the call for purpose of imposing discipline for not protecting one's shift. If there are enough casuals available, a fifteen percenter can pass a call. Regular casuals are not called in any stated order and no effort is ever made to verify calls placed to them. However, preferential casuals are called only once and those calls are verified so that discipline may easily ensue if no one answers the phone.

In the matter of lateness, the record is full of instances in which the Respondent either overlooked tardiness on the part of regular dockworkers or accorded it minimal importance while applying a more stringent standard of punctuality to preferential casuals. Indeed, in the Respondent's effort to show lack of disparate treatment to Manso, the instances of similar stringent treatment for attendance-related infractions upon which it relied upon were limited to conduct on the part of other preferential casuals. Respondent admits that its attendance standards are more lenient for other classes of employees. When asked why the difference, the Respondent conceded that, in terms of the functioning of the dock operation, a preferential casual who comes late to work poses no bigger problem that a regular who is late. The best the Respondent could devise as an explanation for such differential treatment was that preferential casuals were a new category or classifiction of dockworker and this was simply how they decided to handle them. The lack of any credible explanation based upon business necessity for dis-

parity of treatment of a whole class demonstrates that, even now, the Respondent is attempting to harass preferential casuals so that it will be easier to discharge them before they become regular seniority employees, and to persuade regular casuals that they are better off by waiving their right to be processed for preferential status and remaining in regular casual status.

In pursuing its effort to avoid complying with Article 60 of the Western States Area contract, the Respondent resorted to several fanciful arguments based upon its contract with the Union, thus laying the blame for actions it assertedly did not wish to take upon provisions of an agreement by which it was bound and upon the Union which wanted to hold it to the provisions of that contract. According to the Respondent, the implementation of Article 60 meant that it would have to place unqualified preferentials on their regular dockworker seniority list each time a vacancy occurred. There is nothing in the contract which even remotely suggests such a possibility. The contract states, in pertinent part:

> If the casual employee does not meet the Employer's hiring standards and qualifications . . . *while on the preferential hiring* list, the casual and the Local Union shall be so notified in writing and his/her use will be discontinued. (emphasis supplied)

It is abundantly clear that a determination of qualifications for permanent retention should, under the contract, be made while the casual is on the preferential list, not before he is placed there. The award made by National Grievance Committee applied the contract in just that manner and this is how the parties are now required to apply it. To say that moving a dockworker from the regular casual list to the

preferred list automatically entitles him by contract to a place on the regular list, regardless of qualifications, in the event of an opening is so wholly bereft of substance that it is not even arguable.

After the first-step grievance committee became deadlocked, the Respondent advanced a fall-back position. It offered to place casuals on a preferential list if the Union would agree that it had no obligation to train them until an opening should occur on the regular seniority list. The Union wanted all dockworkers trained to operate tractor-trailers whenever they were placed on the preferential list. The contract is silent on this precise point. The practice requested by the Respondent was enjoined upon the parties by the National Grievance Committee award. However, the Respondent was free to implement this practice immediately under the terms of the contract, with or without Union consent. Its proffered excuse for refusing to do so, namely that it feared that the Union would file a grievance if it went ahead unilaterally and did what it had offered to do, is frivolous. The Union had already filed a grievance that involved this question and the award arising out of that grievance resolved it.

Respondent's reason for not training all dockworkers as soon as they are placed on the preferred list also lacks substance and business justification. According to the Respondent, it costs about $1,500 to give a dockworker driver training. The Respondent voiced the fear that, if all preferential dockworkers were given this training, they might quit and go to work for other companies. The same possibility exists with respect to any qualified regular dockworker, most of whom are driver qualified. Moreover, a cadre of driver-trained preferential dockworkers would mean that both they and regular dockworkers would be available for whatever occasional driving chores might arise, rather than

leaving these functions exclusively to the regulars.[9] Here again, the Respondent was raising pretextual excuses for not creating a preferential list of dockworkers by attempting to use the contract as a basis for doing what it really did not want to do under any circumstances.

In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, the Supreme Court gave its approval to the Board's *Interboro* doctrine[10] which, in general terms, states that it is a Section 7 right for an employee to assert rights conferred upon him and his fellow employees through a collective bargaining agreement. In pertinent part, the Court stated:

> Moreover, by applying Section 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also the entire process envisioned by Congress as the means by which to achieve industrial peace.
>
> To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance

[9]Herrington told several casuals just before they were discharged that he was not going to the expense of training twelve dockworkers to drive tractor-trailers because he did not need so many drivers. If true, his statement meant that the Respondent was advancing, as a justification for its position under the contract, a requirement for driver qualification of dockworkers when it really did not need drivers at all.

[10]*Interboro Contractors, Inc.*, 157 NLRB 1295, enf. 388 F.2d 495 (2nd Cir., 1967).

> according to whatever procedures his collective-bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of Section 7. [citations omitted]. Indeed, it would make little sense for Section 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement.
>
> * * *
>
> No one would suggest, for instance, that the filing of a grievance is concerted only if the grievance turns out to be meritorious. As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective-bargaining agreement is enforced. The same is true of other methods by which an employee enforces the agreement. . . . *Supra*, at pages 835, 836, 840, 841.

The protected concerted activity of the six discriminatees named in the complaints in this case does not consist of overt actions, such as complaining to a Union official about safety violations and the failure of an employer to pay employees the contract rate for their services, or the refusal of an employee to drive an unsafe vehicle. Rather, their concerted protected activity was a refusal to sign waivers of their contract rights and the insistence, implicit in such a refusal, that those contract rights be accorded to them.

Herrington told all of the casual dockworkers on or about June 20, 1988, that they were being discharged because they had not signed waivers of their contract right to be processed for inclusion on the preferential list. His statements violated Section 8(a)(1) of the Act. As the direct and immediate result of their refusal to execute contract waivers, the dockworkers were discharged. Such discharges violate Section 8(a)(3) of the Act. *Pennsylvania Electric Company,* 289 NLRB No. 136. Respondent's subsequent refusal to reinstate any casuals until they did sign contract waivers is a follow-up violation of Section 8(a)(3) of the Act. The defense proffered for such discharges was, as outlined above, pretextual. The contract in question did not even arguably provide the Respondent with any warrant for doing what it did, and the grievance award, which was issued following those discharges, simply emphasized that fact.

The statements made to Manso upon his return to work by supervisors McNutt, Lovato, and Beeson amounted to threats that the Respondent would seek further retaliation against Manso because he had filed a grievance and also because he had filed an unfair labor practice charge.[11] Such threats violate Section 8(a)(1) of the Act.

[11]The Respondent has advanced the argument that it should not be charged with any unlawful activity in the summer of 1989 arising out of the action of Manso and Trujillo in filing an unfair labor practice charge against the Respondent on November 21, 1988. It is the Respondent's position that its lower ranking supervisors in Albuquerque were unaware that the charge had been filed and so could not be motivated in their actions by the fact that the charge had been docketed. The record reflects that the original charge in Case No. 28—CA—9500, as well as an amended charge filed a few days later, were served upon the Respondent during the month of November, 1988, at its Albuquerque terminal. Accordingly, the Respondent and all of its agents are deemed to have knowledge that the unfair labor practice charge and the amendment thereto were in fact filed by Manso and Trujillo.

The Complaint in Case No. 28—CA—9916 alleges that the Respondent unlawfully discharged Manso on June 19, 1989, because he filed a charge under the Act and because he filed a grievance. As noted, *supra,* the filing of a grievance is a Section 7 right; the filing of an unfair labor practice charge is protected by Section 8(a)(4) of the Act. Manso was a party not only to a grievance that had been filed against the Respondent; he was a party to a successful grievance that forced the Respondent to comply with a provision of the contract with which it was extremely reluctant to abide.[12] Upon his return to work, Manso was told that the Respondent was laying for him. Within six weeks, he was discharged.

The event that triggered the discharge was his asserted failure to respond to a call to work made at the request of Supervisor Ronald Ford by Teamster Jeff Motter. The call in question was made pursuant to a verification procedure that, as noted above, applied solely to preferential casuals, was more stringent than the call procedure used for other non-shift employees, and a procedure for which the Respondent could advance no business justification. In making the call, Motter was afraid that he had misdialed Manso's phone number, told Ford about the suspected error, and asked to dial again. Ford refused his request and directed Motter to sign a verification form attesting to the fact that Motter had dialed Manso's phone number and that there had been no

[12]The Respondent maintained throughout this proceeding that it actually won the grievance which was filed against it relating to the creation of a list of preferential casuals. Any party to litigation is entitled to put whatever spin it wishes on the outcome of a proceeding. However, the National Grievance Committee nullified the waivers which the Respondent insisted upon exacting from casual dockworkers as the price of their continued employment and ordered that six dockworkers who had refused to execute such waivers be reinstated. This is not the stuff of which notable victories are made.

reply. The Respondent could not justify the discharge that followed from this event to the Arizona-New Mexico Joint State Committee so Manso was reinstated without pay.

It is apparent from these facts that the Respondent harbored animus against Manso for engaging in protected activities and that there was no solid factual basis for its conclusion that Manso did not respond to a call to work on June 19. When Motter noted a suspected dialing error, the Respondent could have easily clarified the question by permitting Motter to dial again. It did not do so, thus evidencing a motive directed not toward filling out its complement of employees for the morning shift but of arming itself with a justification for discharging an unwanted employee. When it discharged Manso on June 19, the Respondent violated Sections 8(a)(1), (3), and (4) of the Act.

On August 17, Manso was admittedly late to work. His reason for tardiness was that his car had overheated on the interstate highway and he had to seek other means of transportation. Fultz admitted in his testimony that, if the Respondent had believed this story, Manso would not have been discharged. However, it suspected that Manso had really overslept and was falsifying an excuse, so it discharged him because it felt that there had been an element of dishonesty in Manso's entire course of conduct in this matter. I am compelled to agree with the Respondent. Manso said that he had parked his overheated vehicle along the side of the road at a stated location on I-40. The plant manager went out to search for the vehicle at this point shortly after Manso made this statement. He found nothing. Manso told the Respondent and testified at the hearing that he had been picked up by his wife in another vehicle and was driving to work when he was stopped for speeding by a deputy sheriff. The officer in question failed to corroborate an essential detail of Manso's story. In testifying in this proceeding,

Officer Smith stated categorically that there was no one in the car with Manso when he stopped to give Manso a warning for excessive speed. Smith was a credible and neutral witness, and I have no reason not to accept his testimony at face value. Accordingly, I must conclude that Manso was lying to the Respondent when he reported that his car had overheated and that he was late for work because of car trouble. In light of this conclusion, I must further find that the Respondent discharged Michael Manso on August 17 for cause and that so much of the complaints which allege that he was discharged on that date in reprisal for concerted protected activities and for filing a charge under the Act must be dismissed.

The Respondent asserts that the Board should defer to the grievance procedure in the contract respecting the issue of the 1988 grievance addressing the discharge of dockworkers for refusing to sign contractual waivers. It recognizes that deferral has been deemed by the Board to be inappropriate for discharges or other disciplinary action alleged to have been taken in violation of Section 8(a)(4) of the Act,[13] so it concedes that a determination on the merits should be made concerning the 1989 disciplinary actions taken against Manso. Respondent's request for deferral to the first grievance determination must necessarily be directed to the final award of April 6, 1989, since the intermediate actions of the Joint State and Western Area boards in that case were deadlocks which did not decide anything and did not result in an award. *Rosicrucian Press, Ltd.*, 264 NLRB 1323.

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[13]See, for example, *Filmation Associates*, 227 NLRB 1721; *International Harvester Co.*, 271 NLRB 647; *Art Steel of California, Inc.*, 256 NLRB 816; with respect to deferring to grievance machinery for charges involving harassment for filing a grievance, see *United States Postal Service*, 290 NLRB No. 20.

The National Grievance Committee did not purport to hear or decide an unfair labor practice case. In fact it paid only perfunctory attention to the contract in question. Its resolution of the dispute between Local 492 and ABF amounted to knocking heads together and issuing directives to two contentious parties. While this may be an effective and common sense way of achieving industrial peace, it does not constitute an arbitral award which meets the standards for deferral.

It should be observed that, in the usual case in which deferral is in question, a disappointed grievant has gone to arbitration, has been turned down, and later seeks from the Board the relief he was denied under the grievance machinery by alleging the existence of an unfair labor practice. In such instances, the Board may be called upon to construe a contract in a manner inconsistent with the contract interpretation rendered by an arbitrator whose principal function is to interpret the meaning of disputed contract clauses. In this instance, the result reached by the National Grievance Committee is consistent with, and indeed supports, the finding of an unfair labor practice, since its award negated the validity of the Respondent's defense to the unfair labor practice allegations in the complaints, namely that the contract required the Respondent to discharge all unqualified casuals who had refused to execute waivers. The only aspect of the grievance resolution which was inconsistent with normal Board practice was the failure of the Committee to award backpay to the grievants.

The April 6, 1989, award by the National Grievance Committee made no findings of fact or conclusions of law. It dealt exclusively with results. It made no mention of the elements of the unfair labor practice issues which were litigated in this proceeding nor did the testimony presented to the Western Area Committee on which the National

Committee relied address any unfair labor practice. Accordingly, the Board should not defer to the award in question. *American Freight Systems, Inc.*, 264 NLRB 126; *Cotter and Company*, 276 NLRB 714; *Ryder/P. I. E. Nationwide, Inc.*, 278 NLRB No. 713; *M & G Convoy, Inc.*, 287 NLRB No. 110; *Dick Gidron Cadillac, Inc.*, 287 NLRB No. 105.[14]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record herein considered as a whole, I make the following:

II. Conclusions of Law

1. ABF Freight System, Inc., is an employer engaged in commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and its Local 492, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging Michael Manso, Andy Trujillo, Jerry Miera, Arnold Haynes, Al Miranda, and Chad Sullins because they insisted that the Respondent comply with the provisions of a collective bargaining agreement governing the terms and conditions of their employment, by refusing to reinstate these employees for the same reason, and by discharging Michael Manso because he filed a grievance

[14]The Respondent also argues that somehow the charges filed in this case were time barred by Section 10(b) of the Act. The original charge was filed on November 21, 1988. The discharges litigated in the complaint arising out of the refusal of certain dockworkers to execute waivers of their contractual rights took place on or about June 20, 1988. The charge was filed well within the six-month period allowed by the Act.

against the Respondent, the Respondent herein violated Section 8(a)(3) of the Act.

4. By discharging Michael Manso because he filed charges under the Act, the Respondent violated Section 8(a)(4) of the Act.

5. By the acts and conduct set forth above in Conclusions of Law Numbers 3 and 4; by threatening employees with discharge because they filed charges under the Act and because they have filed grievances under the provisions of a collective bargaining agreement; and by threatening employees with discharge because they have insisted on the observance of rights guaranteed to them by contract, the Respondent herein violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Sections 2(6) and 2(7) of the Act.

III. Remedy

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. The recommended order will state that Respondent be required to offer full and immediate reinstatement to Andy Trujillo, Jerry Miera, Arnold Haynes, Al Miranda, and Chad Sullins, and that it make them and Michael Manso whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,[15] with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded, Inc.*, 283 NLRB 1173. The fact that the National Grievance Committee failed to award backpay for the contract violation which it impliedly found had been committed by the Respondent is immaterial to a remedy which is appropriate in this case. As the General Counsel pointed out in his brief, backpay orders as remedies for violations of the Act have been a part of Board practice since its inception and there is no reason to depart from that practice in this case. To refrain from doing so because the National Grievance Committee refrained from doing so would be to defer to a portion of that award, an action which would be inappropriate for reasons already stated. See *Consolidated Freightways*, 290 NLRB No. 85. I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recomended:[16]

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[15] *F.W. Woolworth Co.*, 90 NLRB 289.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent ABF Freight System, Inc., and its officers, agents, supervisors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge because they have filed charges under the Act or because they have filed grievances under the provisions of a collective bargaining agreement.

(b) Threatening employees with discharge because they have insisted upon the observance of rights guaranteed to them by the provisions of a collective bargaining agreement.

(c) Discharging employees because they have filed charges under the Act.

(d) Discouraging membership in or activities on behalf of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its Local 492, or any other labor organization by discharging or refusing to reinstate employees, or otherwise discriminating against them in their hire or tenure.

(e) By any like or related means, interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the purposes and policies of the Act:

(a) Offer to Andy Trujillo, Jerry Miera, Arnold Haynes, Al Miranda, and Chad Sullins full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and make them and Michael Manso whole for any loss of pay or benefits suffered by them by reason of the discriminations found herein, in the manner described above in the section entitled "Remedy."

(b) Preserve and, upon request, make available to the Board and its agents for examination and copying all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Post at the Respondent's Albuquerque, New Mexico, terminal copies of the attached notice, marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by a representative of the Respondent, shall be posted immediately upon receipt thereof and shall be maintained by the Respondent for sixty consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily placed. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered over by any other material.

(d) Notify the Regional Director for Region 28, in writing, within twenty days from the date of receipt of this

[17]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Order what steps the Respondent has taken to comply herewith.

INSOFAR as the complaints herein allege matters which have not been found to be violations of the Act, the said complaints are hereby dismissed.

Dated, Washington, D. C. March 21, 1990

WALTER H. MALONEY
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

ABF FREIGHT SYSTEM, INC., IS POSTING THIS NOTICE TO COMPLY WITH AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD WHICH WAS ISSUED AFTER A HEARING IN A CASE IN WHICH WE WERE FOUND TO HAVE VIOLATED CERTAIN PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT.

WE WILL NOT threaten employees with discharge because they have filed charges under the National Labor Relations Act or because they have filed grievances under the provisions of a collective bargaining agreement.

WE WILL NOT threaten employees with discharge because they have insisted upon observance of rights guaranteed to them by the provisions of a collective bargaining agreement.

WE WILL NOT discharge employees because they have filed charges under the National Labor Relations Act or because they have filed grievances under the provisions of a collective bargaining agreement.

WE WILL NOT discharge or refuse to reinstate employees because they have insisted upon the observance of rights guaranteed to them by the provisions of a collective bargaining agreement.

WE WILL NOT, by any like or related means, interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL offer full and immediate reinstatement to ANDY TRUJILLO, JERRY MIERA, ARNOLD HAYNES, AL MIRANDA, and CHAD SULLINS to their former or substantially equivalent employment, and WE WILL make them and MICHAEL MANSO whole for any loss of pay which they have suffered by reason of the discriminations practiced against them, with interest.

ABF FREIGHT SYSTEM, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 234 North Central Avenue—Suite 440, Phoenix, Arizona 85004-2212, Telephone (602) 261-3188.

APPENDIX C—Statutory Provisions.

29 USCS § 152

§ 152. Definitions

When used in this Act [29 USCS §§ 151–158, 159–168]—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 USCS §§ 151–163, 181–188], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 USCS §§ 151–163, 181–188], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State,

Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8 [29 USCS § 158].

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing,

29 USCS § 158

§ 158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 USCS § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 USCS § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [29 USCS § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS § 159(a)].

29 USCS § 160

§ 160. Prevention of unfair labor practices

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 USCS § 158]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [29 USCS §§ 151–158, 159–169] or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States [28 USCS Appx] under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of

the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C) [28 USCS § 2072].

(c) Reduction of testimony to writing; findings and orders of Board. The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [29 USCS §§ 151–158, 159–169]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [29 USCS § 158(a)(1), or (2)], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners [administrative law judge or judges] thereof, such member, or such examiner or examiners [judge or judges], as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court. Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such

manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court. Any person aggrieved by a final order of the Board granting or denying in whole or in

part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order. The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

29 USCS § 173

§ 173. Functions of the Service

(a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act [29 USCS §§ 141–144, 151–158, 159–167, 171–183, 185–187, 191–197, 557].

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

(June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153.)

(2)

No. 92-1550

In the Supreme Court of the United States

OCTOBER TERM, 1992

ABF FREIGHT SYSTEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly ordered petitioner to reinstate with backpay an employee whom the Board found had been discharged for engaging in activity protected by the National Labor Relations Act, even though a grievance committee previously had found that he had been discharged for just cause.

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A20, is reported at 982 F.2d 441. The opinion and order of the National Labor Relations Board, Pet. App. B1-B28, including the decision and recommended order of the administrative law judge, Pet. App. B29-B68, is reported at 304 N.L.R.B. No. 75.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1992. The petition for a writ of certiorari was filed on March 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner ABF Freight System, Inc. operates a trucking terminal in Albuquerque, New Mexico. Pet. App. A7. Petitioner employs both regular and casual dockworkers at that facility. *Ibid.* In April 1988, petitioner negotiated a supplemental labor agreement with the Union[1] that created a new "preferential casual" dockworker classification with certain seniority rights. *Id.* at B4, B6. Based on its interpretation of the agreement, petitioner discharged 12 casual dockworkers, including employee Michael Manso, on June 20. On June 29, petitioner offered to reinstate those who agreed to waive their right to placement on the "preferential casual" list. *Id.* at A8, B7, B13.

The Union filed a grievance on behalf of the dischargees, and Manso filed an unfair labor practice charge with the Board against petitioner. Pet. App. B8, B30 n.1. On April 6, 1989, a grievance panel ordered petitioner to offer the discharged casual dockworkers reinstatement as preferential casuals, but denied all monetary claims. *Id.* at B9-B10. When Manso returned to work, however, he was warned by supervisors to "watch his step" because petitioner was "gunning" for him, and also to be "careful" because "higher management" was "after" him. *Id.* at B46. Another supervisor remarked to Manso: "Well, you made it back. Let's see how long it takes them to get rid of you this time." *Ibid.*

[1] Petitioner's employees were represented by Local 492, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the Union).

On June 19, less than two months after his return, petitioner discharged Manso, ostensibly for a second failure to respond to a work call. Pet. App. B15.[2] Manso filed a grievance, and a grievance panel ordered petitioner to reinstate him without backpay. *Id.* at B47.

Manso again returned to work. On August 11, 1989, he reported for his shift four minutes late and received a written warning. Pet. App. B47. Manso arrived late for work again on August 17, and was closely questioned by management officials. *Id.* at B47-B48. Manso claimed that his car had broken down on the highway and, in the ensuing scramble to get to work, he had been stopped by the police for speeding. *Id.* at B16. Petitioner investigated Manso's explanation and determined that it was largely a fabrication. *Ibid.* On August 21, petitioner fired Manso pursuant to a newly-instituted tardiness policy for preferential casual dockworkers, under which two incidents of lateness resulted in termination. *Ibid.* Manso grieved his discharge, but lost at the first-step hearing and did not pursue the grievance further. *Id.* at B48. Thereafter, he filed a second unfair labor

[2] The circumstances surrounding this discharge are as follows: On May 6, Manso failed to respond to a phone call summoning him to work, and petitioner issued him a written warning. Then, on June 19, supervisor Ronald Ford asked Jeff Motter, a regular dockworker, to summon Manso for work on the 8:30 a.m. shift. Motter telephoned Manso and received no answer, but Motter was tired and believed he might have misdialed the number. Motter told Ford he might have misdialed Manso's number and asked for permission to dial it again, but Ford refused and insisted that Motter sign a form verifying that the call had been placed. Pet. App. B47.

practice charge with the Board against petitioner. *Id.* at B30 n.1.

2. The Board, in agreement with the administrative law judge (ALJ), rejected petitioner's claim that the Board should defer to the grievance panel's April 6, 1989, award respecting the discharge of the casual dockworkers. The Board explained that deferral to the grievance panel's award was inappropriate under the Board's *Spielberg/Olin* policy[3] since "no evidence pertinent to the [Section] 8(a)(1) and (3) allegations * * * was placed in the record of the contractual proceeding." Pet. App. B9 n.5.[4] But, in disagreement with the ALJ, the Board held that petitioner's discharge of the casual dockworkers in June 1988 did not violate the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, because petitioner based those terminations, and its subsequent offer of reinstatement, upon a "nondiscriminatory, reasonable, and arguably

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[3] Under its discretionary deferral policy, the Board will defer to an arbitral award where the arbitrator's decision is not repugnant to the purposes and policies of the National Labor Relations Act, the arbitration proceedings are fair and regular, the parties have agreed to be bound by the award, and the unfair labor practice issue was adequately considered by the arbitrator. See *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

[4] Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

correct interpretation" of the supplemental agreement. Pet. App. B13-B14.

The Board, agreeing with the ALJ, concluded that petitioner's discharge of Manso in June 1989 violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act,[5] because petitioner fired him in retaliation for participating in the grievance filed by the Union respecting petitioner's termination of the casual dockworkers in June 1988, and for filing a charge with the Board in connection with that incident. Pet. App. B15, B57-B58. Disagreeing with the ALJ, the Board further concluded that Manso's August 1989 discharge also violated Section 8(a)(1), (3), and (4). Pet. App. B21.

Regarding the latter conclusion, the Board found that the supervisors' threats of retaliation and Manso's subsequent unlawful discharge in June provided "strong evidence" of unlawful motivation respecting the August discharge. Pet. App. B18. The Board further found that the ALJ's conclusion that petitioner lawfully fired Manso because Manso lied about his reason for being late on August 17 was premised upon "a plainly erroneous factual statement of [petitioner's] asserted reasons" for the discharge. *Ibid.* The testimony of petitioner's operations man-

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[5] Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act.

Petitioner did not seek Board deferral to the grievance panel awards concerning Manso's discharges, because petitioner acknowledged that the Board will not defer to grievance/arbitration awards for discipline alleged to have violated Section 8(a)(4) of the Act. Pet. App. B59 & n.13.

ager made it clear that Manso was not fired for dishonesty; rather, his lie established only that he did not have a legitimate excuse for being late and was thus discharged under the newly-instituted policy making two incidents of lateness grounds for discharge. *Id.* at B16.[6] Finally, the Board found that "[petitioner's] treatment of Manso under the lateness policy was not consistent with its previous conduct within the disciplinary framework for preferential casuals." *Id.* at B20.[7] The Board therefore concluded that petitioner had seized upon Manso's second tardiness on August 17 "as a pretext to discharge him again and for the same unlawful reasons it discharged him" in June. *Id.* at B21. Accordingly, the Board ordered petitioner, inter alia, to make Manso whole for any loss of earnings and benefits suffered as a result of his August 1989 discharge, and to offer him immediate reinstatement as a preferential casual dockworker. *Ibid.*

3. The court of appeals affirmed, as supported by substantial evidence, the Board's finding that petitioner fired Manso in August 1989 in retaliation for his protected activity, and not for cause. Pet. App.

[6] The Board observed that "[petitioner] provided no evidence that it had treated Manso's dishonesty in and of itself as an independent basis for discharge or any other disciplinary action." Pet. App. B18.

[7] The Board observed that petitioner did not establish its lateness policy until after Manso's first infraction on August 11, but applied that policy retroactively to discharge him on the basis of the August 11 and August 17 episodes. Pet. App. B20. By contrast, petitioner did not apply its policy respecting failure to respond to work calls to infractions which had occurred prior to implementation of that policy. *Ibid.*

A18. Reviewing the record under the framework set forth by this Court in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), the court of appeals found "abundant evidence of antiunion animus in [petitioner's] conduct towards Manso," Pet. App. A16, and found, further, that petitioner had failed to show that it would have discharged Manso in the absence of his protected activity. *Id.* at A18.[8]

The court of appeals also rejected petitioner's contention that the grievance panel's finding that petitioner discharged Manso for cause in August 1989 was "final and binding" upon the Board. Pet. App. A14. Citing its decision in *NLRB* v. *Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980), cert. denied, 452 U.S. 930 (1981), the court observed that the Board has "wide discretion" in determining whether to defer to such an award. Pet. App. A15. The court held that, given the "ample evidence" supporting the Board's independent finding that petitioner fired Manso in August 1989 in retaliation for his protected activity, the Board acted within its discretion in declining to afford the panel's award deference. *Ibid.* Accord-

[8] In the court of appeals, petitioner did not challenge the Board's finding that Manso's June 1989 discharge was unlawful (and does not do so in this Court). Rather, petitioner claimed, in contesting the Board's finding respecting the August 1989 discharge, that the supervisors who made threatening statements to Manso in June, see page 2, *supra*, were not involved in the decision to terminate him in August, and that there was no connection between those statements and the management officials who made the decision to terminate him in August. See Resp. C.A. Br. 1-3, 31-32; Resp. Reply Br. 23-24. The court of appeals implicitly rejected that argument. See Pet. App. A16-A17.

ingly, the court affirmed the Board's order that petitioner must reinstate Manso with backpay, and rejected petitioner's contention that the Board's remedial authority respecting Manso's August discharge was limited to declaratory relief. *Ibid.*

Finally, the court of appeals rejected petitioner's assertion that, because Manso lied to petitioner about the reason for his tardiness on August 17, 1989, and repeated that untruthful explanation during his testimony before the ALJ in the unfair labor practice proceeding, considerations of public policy barred the Board from ordering his reinstatement with backpay. Pet. App. A18-A19. The court noted that the Board has "wide discretion in assessing whether, in its judgment, a particular remedy will effectuate the policies of the Act," and held that the Board did not abuse its discretion in deciding that Manso's conduct "did not rise to the level of misconduct requiring that reinstatement should be denied." *Id.* at A19.[9]

ARGUMENT

Petitioner does not directly challenge the Board's finding, upheld by the court of appeals, that it violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act by discharging Manso because he protested the discharge of the casual dockworkers by, inter alia, filing charges with the Board. Petitioner contends that, nevertheless, the Board was precluded

[9] The court of appeals affirmed, as supported by substantial evidence, the Board's finding that petitioner did not violate the Act in connection with its dismissal of the casual dockworkers in June 1988. Pet. App. A13. The employees aggrieved by that aspect of the court of appeals' decision have not sought further review of it by this Court.

from ordering Manso reinstated with backpay for two reasons: (1) the Board had to give "dispositive" effect to the grievance panel's finding that petitioner fired Manso in August 1989 for just cause, and (2) Manso forfeited his right to reinstatement and backpay by testifying untruthfully in the unfair labor practice proceeding respecting his reason for reporting late to work on August 17, 1989. Pet. 8. Neither contention warrants further review.

1. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, absent extraordinary circumstances, "[n]o objection that has not been urged before the Board * * * shall be considered by the court." This Court has made clear that a party who has prevailed before the ALJ must object to the Board's contrary decision in a petition for reconsideration in order to challenge the Board's decision in the courts. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Having reversed the ALJ's finding that Manso was discharged for cause in August, the Board issued the traditional make-whole remedy of reinstatement with backpay. In order to preserve an objection to the Board's remedy, petitioner was required to file a motion for reconsideration, but it failed to do so. Accordingly, petitioner's objection to the Board's remedy for Manso is jurisdictionally barred.

2. In any event, there is no merit to petitioner's challenge to the Board's remedy.

a. Section 10(a) of the Act, 29 U.S.C. 160(a), provides that the Board's authority to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or

may be established by agreement, law, or otherwise." The Board is thus empowered to remedy the discharge of an employee for engaging in activity protected by the Act, whether or not the discharge constitutes a breach of contract or was adjudicated under the contract grievance and arbitration procedure. See *NLRB* v. *Strong*, 393 U.S. 357, 362 (1969); *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 271-272 (1964).[10] Although the Board will defer to contractual grievance resolution processes in some circumstances, it will not do so when, as here, the unfair labor practice claim alleges retaliation for resort to the Board's processes. Page 5 note 5, *supra*; see *International Harvester Co.*, 271 N.L.R.B. 647 (1984); *Filmation Associates, Inc.*, 227 N.L.R.B. 1721 (1977). See also *Grand Rapids Die Casting Corp.* v. *NLRB*, 831 F.2d 112, 115-116 (6th Cir. 1987).

Petitioner did not challenge the Board's deferral policy in regard to Manso's discharge before the

[10] The cases cited at Pet. 7-9 are inapposite. For the most part they involve the deference that courts must give to arbitral determinations. See, *e.g.*, *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Owens* v. *Texaco, Inc.*, 857 F.2d 262 (5th Cir. 1988), cert. denied, 490 U.S. 1046 (1989). "The relationship of the Board to the arbitration process is of a quite different order" from that of the courts to the arbitration process. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436 (1967). *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975), see Pet. 9, is also inapposite. There, the Court held that employees represented by a union had no right to bypass the contractual grievance process, and demand direct negotiations with the employer on their complaints of racial discrimination, where the labor contract made such discrimination a grievable issue.

Board or before the court of appeals, and petitioner does not directly challenge that policy here. Rather, petitioner contends, Pet. 10-16, that, because the grievance committee upheld Manso's discharge, the Board is limited to providing "declaratory, injunctive, and other equitable relief," Pet. 9; according to petitioner, the Board may not order Manso's reinstatement with backpay. That is so, petitioner maintains, because Section 10(c) of the Act, 29 U.S.C. 160(c), prohibits the reinstatement of any employee discharged for cause.[11]

But if the Board was not required to defer to the grievance panel's determination that Manso was discharged for violation of the Company's tardiness policy and was free to find (as it did) that, in fact, he would not have been discharged except for his protected activity, it follows that the Board could conclude, contrary to the view of the grievance panel, that Manso was *not* discharged for cause. Therefore,

[11] Section 10(c) of the Act, 29 U.S.C. 160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in * * * any such unfair labor practice * * * the Board shall state its findings of fact and shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]. * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

the Board did not offend Section 10(c) by ordering Manso reinstated with backpay. Section 10(c) precludes such relief only where the employee "was * * * discharged for cause," not where, as here, the reliance on cause is shown to have been a pretext.[12]

b. Petitioner further contends, Pet. 16-20, that it is contrary to the policies of the Act to reinstate Manso with backpay because he testified untruthfully in the Board proceeding, and that the decision of the court below in upholding the Board's order in these circumstances conflicts with decisions of other courts of appeals. This claim is also without merit.

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[12] The cases relied on by petitioner, Pet. 11, in which courts found that a discriminatorily discharged employee nevertheless was not entitled to reinstatement, are distinguishable. In two cases the employees denied reinstatement had engaged in serious misconduct or were unfit for continued employment. See *NLRB* v. *Big Three Industrial Gas & Equipment Co.*, 405 F.2d 1140, 1143 (5th Cir. 1969) ("incompatible with the safety on the public highways" to reinstate truck driver with serious traffic infractions); *NLRB* v. *Apico Inns of California, Inc.*, 512 F.2d 1171, 1173-1176 (9th Cir. 1975) ("reprehensible" and "egregious" conduct, including lewdness toward co-employees and customers and sexual harassment of co-employees). In *Montgomery Ward & Co.* v. *NLRB*, 664 F.2d 1095, 1097 (8th Cir. 1981), and *Pacific Tel. & Tel. Co.* v. *NLRB*, 711 F.2d 134, 137-138 (9th Cir. 1983), the employees were concededly discharged for cause; the courts disagreed with the Board that reinstatement was nonetheless appropriate because the employees had been denied the right to union representation in the investigatory process. In *General Teamsters Local No. 162* v. *NLRB*, 782 F.2d 839 (9th Cir. 1986), the Board, upheld by the court of appeals, denied reinstatement and backpay to employees guilty of egregious acts of misconduct during a strike.

The Board will withhold its usual remedy of reinstatement with backpay from a discriminatee who makes false statements at a Board hearing when the discriminatee's conduct "was intended to or in effect amounted to a malicious abuse of the Board's processes under circumstances which require forfeiture of remedy to effectuate the purposes of the Act." *Service Garage, Inc.*, 256 N.L.R.B. 931, 931 (1981), enforcement denied on other grounds, 668 F.2d 247 (6th Cir. 1982); *Owens Illinois, Inc.*, 290 N.L.R.B. 1193 (1988), order enforced, 872 F.2d 413 (3d Cir. 1989) (Table). In deciding whether denial of reinstatement is appropriate, the Board examines all of the relevant facts, including whether the ALJ credited the employee's testimony respecting the underlying violation of the Act, whether the employee was otherwise a generally trustworthy witness, and whether the employer demonstrated that the employee was unfit for further employment. *E.g.*, *Owens Illinois, Inc.*, *supra*.

The court of appeals correctly held, Pet. App. A19, that the Board did not abuse "its considerable discretion in deciding that Manso's conduct in this case did not rise to the level of misconduct requiring that reinstatement should be denied." Thus, although Manso testified falsely respecting his reason for reporting to work late on August 17, that fabrication was an isolated lapse in what was otherwise truthful testimony. The ALJ specifically credited Manso's testimony about threats of retaliation he received from petitioner's supervisors upon returning to work in June, *id.* at B46, and the Board found that testimony "stong evidence" of unlawful motivation respecting the August discharge. *Id.* at B18. Fur-

ther, petitioner did not show that the lie (which did not misrepresent any occurrence in the course of employment or at the employer's premises) made Manso unfit for further employment as a preferential casual dockworker.

Petitioner relies principally on *Precision Window Mfg., Inc.* v. *NLRB*, 963 F.2d 1105 (8th Cir. 1992). Pet. 17-19. But in that case the court found reinstatement inappropriate, not merely because the employee had lied, but also because he had threatened to kill his supervisor. 963 F.2d 1109. Moreover, as the court below pointed out in distinguishing *Precision Window*: "There the employee lied in the first instance during the administrative hearing by misrepresenting facts that were highly relevant to determining whether he was fired for his union activity. Here, to the contrary, Manso's original misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus." Pet. App. A19. That fact distinguishes this case from *Precision Window* and from the other cases cited by petitioner.[13]

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[13] The other cases that petitioner relies on are factually distinguishable. In *NLRB* v. *Magnusen*, 523 F.2d 643, 646 (9th Cir. 1975), see Pet. 17, 18, the employee "stole from his employer and * * * severely impeded the vital fact-finding process by repeated lying" (footnote omitted). In *Iowa Beef Packers, Inc.* v. *NLRB*, 331 F.2d 176, 185 (8th Cir. 1964), see Pet. 18, the employee made false representations in his unfair labor practice charge as well as gave false testimony at the Board hearing. In *NLRB* v. *Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964), see Pet. 18, the court rejected the Board's decision to credit the testimony of an employee that he had been discharged because the employee was a dishonest witness. The court's statement that even if the employee had been discharged, his dishonesty would have precluded reinstatement, was dictum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1993

No. 92-1550

In The

Supreme Court of the United States

October Term, 1993

ABF FREIGHT SYSTEM, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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December 18, 1989	First Amended Answer to Complaint and Notice of Hearing
December 26, 1989	Motion for Summary Judgment and Supporting Brief
December 29, 1989	Response in Opposition to Respondent's Motion for Summary Judgment
December 30, 1989	Reply to Region 28's Response in Opposition to Motion for Summary Judgment
January 2, 1990	Motion for Severance and for Continuance
January 4, 1990	General Counsel's Opposition to Respondent's Motion for Severance and Continuance
January 4, 1990	ABF's Reply to General Counsel's Opposition to Respondent's Motion for Severance and Continuance
January 4, 1990	Order Denying Motion for Severance and for Continuance
January 6, 1990	Second Amended Answer to Complaint and Notice of Hearing
February 12, 1990	Respondent's Post-Hearing Brief
March 12, 1990	Reply Brief of Respondent ABF Freight System, Inc.

March 21, 1990	Order Transferring Proceeding to the National Labor Relations Board
March 21, 1990	Decision NLRB
April 18, 1990	Respondent's Statement of Exceptions to Decision and Order of the Administrative Law Judge and Brief in Support of Exceptions
June 19, 1990	Charging Party Michael Manso's Statement of Cross-Exceptions and Brief in Support
June 19, 1990	Charging Parties' Response to Respondent's Statement of Exceptions to Decision and Order of the Administrative Law Judge and Brief in Support of Exceptions
June 25, 1990	Motion to Strike Cross-Exceptions and Brief in Opposition to Motion for Reconsideration
July 13, 1990	Respondent's Answering Brief and Supplemental Motion to Strike Charging Party Manso's Statement of Cross-Exceptions and Brief in Support
August 27, 1991	Decision and Order
February 3, 1992	Application for Enforcement of an Order of the National Labor Relations Board
February 13, 1992	Docketing Statement
February 20, 1992	Respondent's Answer
March 14, 1992	Brief of Respondent ABF Freight System, Inc.

May 18, 1992	Brief for the National Labor Relations Board
June 15, 1992	Reply Brief of Respondent ABF Freight System, Inc.
July 14, 1992	Reply Brief for the NLRB
December 29, 1992	Tenth Circuit Decision
January 29, 1993	Motion To Stay Mandate
March 23, 1993	Petition for a Writ of Certiorari
June 14, 1993	Writ Granted

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

ABF FREIGHT SYSTEM, INC.

and Case 28-CA-9500

MICHAEL MANSO, an Individual

ANDY TRUJILLO, an Individual

MICHAEL MANSO, an Individual Case 28-CA-9916

ORDER CONSOLIDATING CASES

On September 21, 1989, a Complaint and Notice of Hearing issued in Case 28-CA-9500 scheduling a hearing in that matter for November 7, 1989, at 9 a.m. (MST), and continuing on consecutive days thereafter until concluded, in the Hearing Room, National Labor Relations Board, Patio Plaza Building, Upper Level, 5000 Marble Avenue NE, Albuquerque, New Mexico. On October 5, 1989, the hearing in Case 28-CA-9500 was rescheduled to December 12, 1989, at the same time and place.

On October 13, 1989, a Complaint and Notice of Hearing issued in Case 28-CA-9916, scheduling a hearing in that matter for December 12, 1989, at 9 a.m. (MST), in the Hearing Room, National Labor Relations Board, Patio Plaza Building, Upper Level, 5000 Marble Avenue NE, Albuquerque, New Mexico.

The General Counsel of the National Labor Relations Board, by the undersigned, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary cost or delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that Case 28-CA-9500 and Case 28-CA-9916 be, and the same hereby are, consolidated for hearing.

Dated at Phoenix, Arizona, this 13th day of October, 1989.

/s/ Roy H. Garner
Roy H. Garner,
Regional Director

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

ABF FREIGHT SYSTEM, INC., Respondent, and MICHAEL MANSO and ANDY TRUJILLO, Charging Parties.	)	CASE NOS. 28-CA-9500 and 28-CA-9916

RESPONDENT'S POST-HEARING BRIEF

John V. Jansonius
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ATTORNEYS FOR RESPONDENT
ABF FREIGHT SYSTEM, INC.

Dated: February 10, 1990

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* * *

F. Use Of Preferential Hire List Since April 1989.

34. The six casuals that ABF recalled to the casual list in April 1989 are Arnold Haynes, Michael Manso, Jerry Miera, Albert Miranda, Chad Sullins, and Andy Trujillo. Mr. Miera and Mr. Miranda did not respond to ABF's letter and never returned to work.

36. Messrs. Haynes, Sullins, and Trujillo did return to work and remain on the preferential hiring list for casuals. (A. Haynes ty., Tr. 210-211; C. Sullins ty., Tr. 195; A. Trujillo ty., Tr. 221).

35. ABF presently has seven employees on the preferential hiring list and, at the time of the hearing, two other casuals were being processed for placement on the preferential hiring list. For ABF, Article 60, § 4(e) has satisfied its purpose of creating a more readily available supply of extra labor to accommodate the variable workload and of reducing the amount of time spent by supervisors on the dock in contacting casuals when extra help is needed. (E. Fultz ty., Tr. 417).

G. Events Leading To Termination Of Michael Manso In August 1989.

36. Michael Manso returned to work in April 1989. When Mr. Manso and the other casuals returned to work, ABF sent them a letter explaining the five daily start times. (E. Fultz ty., Tr. 425-426). Mr. Manso was unavailable for call on one occasion before the start-time notice was mailed, and he was not written up or disciplined on that occasion. (E. Fultz ty., Tr. 437, 439).

37. On May 8, 1989, Mr. Manso again did not answer a report to work call. He was mailed a written warning and told that a future occurrence could result in his termination. (RX 12; E. Fultz ty., Tr. 437-439).

38. Mr. Manso was again unavailable for call on June 19, 1989, and at that time was terminated as a casual employee. Mr. Manso filed a grievance over that incident and at the grievance hearing explained, for the first time, that his telephone was out of service. The Grievance Committee commuted Mr. Manso's discipline to a suspension without pay. (RX 14; E. Fultz ty., Tr. 439-440; M. Manso ty., Tr. 122-123).

39. The next disciplinary incident involving Mr. Manso was on August 11, 1989. That day, Mr. Manso arrived for work four minutes late and was issued a warning letter for tardiness. Mr. Fultz visited with Mr. Manso at that time and told him that he should be aware that future incidences of tardiness could result in termination. (E. Fultz ty., Tr. 440-443; RX 16).

40. Mr. Manso was late for work again on August 17, 1989. His shift was to begin at 5:00 a.m. that day and, at 5:25 a.m., he called the terminal to report that his car had stalled on the freeway. Mr. Manso arrived at the terminal at approximately 5:50 a.m. that morning. (E. Fultz ty., Tr. 447; M. Manso ty., Tr. 126-130).

41. When he arrived at the terminal that morning, Mr. Manso met with Dock Foreman Tom McNutt. Mr. McNutt filled out a corrective interview sheet, as dock foremen are required to do every time there is a tardiness, explaining that Mr. Manso was late because his car broke down on the freeway and also stating that Mr. Manso had

been offered assistance by Officer Derryl Smith of the Bernalillo County Sheriff's Department. Mr. Manso testified that he refused to sign the corrective interview sheet because he had not been offered assistance by Officer Smith. The meeting between Mr. Manso and Mr. McNutt became very heated and resulted in yelling, according to Mr. Manso, and Mr. Manso then asked for permission to speak to his shop steward and was given permission to do so. (M. Manso ty., Tr. 131-133).

42. Later in the morning of August 17, Mr. Manso was called into a meeting with Branch Manager Mike Long and Operations Manager Ed Fultz. Mr. Manso was evasive and did not want to explain why he was late for work that day. In a meeting with Mr. Long, Mr. Fultz, Mr. Manso, and Shop Steward Walter Maestas, Mr. Maestas suggested that ABF call Officer Smith to find out what really happened. (M. Manso ty., Tr. 133-135; E. Fultz ty., Tr. 447-450).

43. Mr. Long and Mr. Fultz were suspect of Mr. Manso's explanation for his tardiness and followed up on the suggestion that they contact Officer Smith. After looking into Mr. Manso's explanation for his tardiness, Mr. Long and Mr. Fultz concluded that his explanation was not legitimate and that his tardiness was not excused. (E. Fultz ty., Tr. 448-450).

44. Mr. Manso was terminated by ABF effective August 21, 1989. (RX 17). Mr. Manso grieved his termination, and the case was heard by the Arizona-New Mexico Joint State Committee. The Grievance Committee overruled Mr. Manso's grievance. (M. Manso ty., Tr. 153-154).

45. Mr. Manso was the first casual on the preferential hire list to be tardy and there is no evidence that any casuals on the preferential hire list have been tardy on two or more occasions. Four casuals on the preferential hire list, in addition to Mr. Manso, have been terminated for a second occurrence of failure to protect start time by being unavailable when being called to work. They are Albert Miranda, Rick Tingley, Greg Clark, and Tim Connelly. (Tr. 427-434; RX 11).

III.

CASE NO. 9500 – ARGUMENT AND AUTHORITIES

Evidence presented at the hearing in this unfair labor practice case proved one thing beyond all others: the real dispute in this case involves interpretation of a collective barqaining agreement. Representatives of Local 492 and ABF uniformly testified that ABF's treatment of the casuals named in the Complaint and in the grievance was the consequence of an honest difference of opinion between the union and the company over requirements of new language in the Western States Agreement. ABF did not retaliate or discriminate against Charging Parties or other casuals because they engaged in

* * *

IV.

CASE 9916 – ARGUMENT AND AUTHORITIES

In its Complaint in Case No. 28-CA-9916, Region 28 alleges that ABF terminated Michael Manso from work as a casual on August 17, 1989 because he gave testimony in Case 9500. At the hearing, however, no evidence was presented to support this claim, or to support a finding that Respondent's treatment of Manso in any manner violated LMRA §§ 8(a)(1), (3), or (4). Far from it, the evidence showed: (1) that ABF has terminated other similarly situated preferential casuals; (2) that ABF has continued to employ other bargaining unit employees who filed unfair labor practice charges; and (3) that nobody involved in the decision to terminate Manso's employment knew he had filed an unfair labor practice charge or given testimony to the Board.

A. Evidence In The Record Does Not Support A Finding That Discriminatory Or Retaliatory Considerations Entered Into The Decision To Discontinue Manso's Use As A Casual.

Mike Manso was late for work on August 11 and August 17 last year – that fact is undisputed. Also undisputed is the fact that the Grievance Committee found that ABF had just cause to quit using Manso as a casual. (M. Manso ty., Tr. 153-154; E. Fultz ty., Tr. 476-479; RX 16, 17).

* * *

C. Manso Is Not A Credible Witness.

Rarely does a witness under oath speak as transparent a lie as did Michael Manso. To cover up his unexcused tardiness on August 17, 1988, Mr. Manso explained to ABF and testified in the hearing that his car broke down on the freeway while on his way to work, that he walked from the freeway across an arroyo to a service station, that he called his wife at home, that his wife picked him up at the service station, that he took the wheel and began driving from the service station to ABF's terminal, and that on the way to work he was pulled over for speeding. Mr. Manso testified that his wife was with him when he was pulled over. (M. Manso ty. Tr. 152).

Mr. Manso's version of events is implausible from a timing standpoint,[17] and his testimony that his wife picked him up at the service station and was with him when he was pulled over for speeding is an outright lie. Mr. Manso's wife was present in the hearing room and could have corroborated his story, but she did not do so.

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[17] On cross examination, Manso testified that it is about 10-15 minutes from his house to the spot where his car broke down on August 17. He further testified that he called ABF at 5:25 a.m. that morning from a service station, and then called his wife at home. His wife then got out of bed, got in the car, and made the 10-15 minute drive to the service station where Manso supposedly was waiting. He then took the wheel and after getting back on the freeway for the remaining 10 minutes or so drive to the terminal, he was pulled over for speeding. Nevertheless, Manso made it to the terminal by 5:50 a.m. (M. Manso ty., Tr. 152-153). The timing of events as described by Manso is highly implausible, if not impossible.

(M. Manso ty., Tr. 507). Further, Officer Derryl Smith of the Bernalillo County Sheriff's Department testified Manso was alone when he was pulled over for speeding, not with his wife. (Officer Smith ty., Tr. 512-513).

On the subject of Article 60, § 4(e) waivers, Mr. Manso's testimony was controverted by another witness with no interest in the outcome of this case – Mr. Bob Herrington. Mr. Herrington was Operations Manager for a period ending in January 1988, but he has not worked for ABF since then and he had no involvement in the termination of Mr. Manso. (B. Herrington ty., Tr. 493-494). Mr. Manso testified that he called Mr. Herrington on at least one occasion to see if ABF would let him sign a waiver of automatic processing for preferential hire status, but Mr. Herrington flatly denied that Manso ever made such an attempt. (M. Manso ty., Tr. 106-107; B. Herrington ty., Tr. 498).

According to Manso, when he returned to work, Operations Supervisors Kyle Beeson, Chris Lovato, and Thomas McNutt separately approached Mr. Manso and made comments to the effect that ABF was out to get him. (M. Manso ty., Tr. 109-115).[18] There was no corroboration of Mr. Manso's testimony. On the other hand, Supervisors Beeson, Lovato, and McNutt all testified consistently and without contradiction by others that they did not make

[18] Even if Mr. Manso could be believed, the comments he attributes to Messrs. Beeson, Lovato, and McNutt are immaterial. There is no evidence that these supervisors were involved in the decision to discharge Manso, nor is there evidence that the alleged comments by these supervisors were based on things said by the decision makers.

the statements attributed to them by Mr. Manso. (K. Beeson ty., Tr. 404-405; C. Lovato ty., Tr. 379-380; T. McNutt ty., Tr. 410).

Plainly, Manso's credibility as a witness is negligible. His testimony was directly contradicted by witnesses with no interest in the outcome of this case and his version of events is largely inconsistent or exaggerated in contrast to the testimony of all other witnesses. Even if Charging Party could be believed, however, there is not sufficient grounds in what he said to support a finding that ABF has discriminated or retaliated against him.

D. As A Matter Of Law, Manso Is Not Entitled To Reinstatement Or Backpay

Section 10(c) of the NLRA, 29 U.S.C. § 160(c) provides that no order by the Board shall require reinstatement of an employee or payment of backpay to an individual discharged for cause. As the record indicates, Manso was discharged for cause. Manso grieved his discharge, but it was upheld by the grievance committee. *See Owens v. Texaco, Inc.*, 857 F.2d 262, 265 (5th Cir. 1988) (arbitral decision is final and binding as to questions of rights under contract). Thus, contrary to the General Counsel's contention, Manso is not entitled to reinstatement or backpay.

V.

CONCLUSION

There is no evidence to support a finding that ABF engaged in unlawful conduct as alleged by Region 28 in

Case Nos. 28-CA-9500 and 9916. What the evidence does show, very clearly, is that ABF has tried to comply with new language in the Western States Agreement creating a category of employee that did not exist before. The employment practices challenged in Case Nos. 9500 and 9916 involve interpretation and application of the new contract language, and the issues have been appropriately resolved through the contractual grievance procedure.

In closing, Counsel for the General Counsel did not prove substantive allegations in the Complaints. Rather, the evidence presented by the Counsel for the General Counsel supports no claim by General Counsel with the possible exception that he disapproves with ABF's adherence to new provisions in the labor contract and the Grievance Committee's application of the new contract language. The unfair labor practice claims in Case Nos. 9500 and 9916 are unsubstantiated and should be dismissed.

DATED this 10th day of February, 1990.

Respectfully submitted,

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/s/ John V. Jansonius
John V. Jansonius

ATTORNEYS FOR RESPONDENT
ABF FREIGHT SYSTEM, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of Respondent's Post-Hearing Brief are being served on all counsel of record, Charging Parties, and the Resident Officer of NLRB Region 28 in Albuquerque by first class United States mail, postage prepaid, on the final date for filing post-hearing briefs set by the Administrative Law Judge in these consolidated cases.

/s/ John V. Jansonius

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

ABF FREIGHT SYSTEM, INC. Respondent, and MICHAEL MANSO and ANDY TRUJILLO, Charging Parties.	)	Case Nos. 28-CA-9500 and 28-CA-9916

REPLY BRIEF OF RESPONDENT ABF FREIGHT SYSTEM, INC.

TO: The Honorable Walter H. Maloney, Jr.
Administrative Law Judge
Division of Administrative Law Judges
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

SUBMITTED BY:

John V. Jansonius
HAYNES AND BOONE
3100 NCNB Plaza
901 Main Street
Dallas, Texas 75202-3714

DATED: February 28, 1990

* * *

9. General Counsel's Brief, p. 14, ¶ 1.

Turning to Case 9916, Counsel for the General Counsel recites Charging Party Manso's testimony about comments allegedly made by Dock Foremen Kyle Beeson, Chris Lovato, and Tom McNutt. These comments, even if they had been made, have no probative value.

First, Counsel for the General Counsel failed to put on testimony showing that the alleged comments by Foremen Beeson, Lovato, and McNutt were based on information from the individuals responsible for the decision to terminate Mr. Manso. It is uncontroverted that these Foremen were not involved in that decision. (See facts and record cites stated on pages 40, 42-43 of Respondent's Post-Hearing Brief). Another point: the alleged comments by Messrs. Beeson, Lovato, and McNutt are innocuous as to the issue of motive. There is no evidence in the record to suggest that the Foremen knew anything about Manso's involvement in an unfair labor practice case and there certainly is nothing to suggest that the Foremen or ABF disapprove of employees' resorting to the grievance procedure or to the NLRB. Third, in response to Counsel for the General Counsel's suggestion that Manso is credible, Respondent urges that Messrs. Beeson's, Lovato's, and McNutt's unequivocal denial that they made the comments attributed to them by Mr. Manso are immeasurably more reliable than the uncorroborated testimony of a single witness with an interest in the outcome of the case whose testimony on at least one specific fact has been shown beyond any reasonable doubt to be false.

(See facts and record cites on pages 41-43 of Respondent's Post-Hearing Brief).

10. General Counsel's Brief, p. 15, ¶ 1.

Here, the General Counsel stridently urges that the Arizona-New Mexico Joint State Committee "saw through the Respondent's flimsy artifice," and ordered that Manso be returned to work after he was removed from the preferential hiring list for unavailability for call in June 1989. Counsel for the General Counsel neglected to point out that the Joint State Committee sustained ABF's discipline to the extent of suspending Mr. Manso without pay. (E. Fultz ty., Tr. 439-440, RX 14). Mischaracterization of this incident by Counsel for the General Counsel is further evident in the fact that other casuals have been let go for precisely the same reason. (See facts and record references on pages 38-39 of Respondent's Post-Hearing Brief).

11. General Counsel's Brief, pp. 15-16.

With no effort to support his argument, Counsel for the General Counsel states that "[T]he record is in fact replete with examples of the application of a more stringent policy for Michael Manso than for other employees." This just isn't so. No evidence was presented concerning employees similarly situated to Charging Party that have been treated more leniently than he. Further, Counsel for the General Counsel ignores the uncontroverted testimony that several employees have filed grievances and/

or unfair labor practice charges without adverse consequence to their continued employment at ABF.

In short, Counsel for the General Counsel has not satisfied his burdens of proof in Case Nos. 28-CA-9500 and 9916 and, as further explained in Respondent's Post-Hearing Brief filed on February 12, 1990, the Complaint in Case Nos. 28-CA-9500 and 9916 should be dismissed.

Respectfully submitted,

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/s/ John V. Jansonius
John V. Jansonius

ATTORNEYS FOR RESPONDENT
ABF FREIGHT SYSTEM, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Reply Brief of Respondent ABF Freight System was served by first class United States mail, postage pre-paid, addressed to the following persons on the 28th day of February, 1990:

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/s/ John V. Jansonius
John V. Jansonius

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

ABF FREIGHT SYSTEM, INC., Respondent, and MICHAEL MANSO, an individual, and ANDY TRUJILLO, an individual, Charging Parties.	§ § § § § § § § § §	Case Nos. 28-CA-9500 and 28-CA-9916

RESPONDENT'S ANSWERING BRIEF AND SUPPLEMENTAL MOTION TO STRIKE CHARGING PARTY MANSO'S STATEMENT OF CROSS-EXCEPTIONS AND BRIEF IN SUPPORT

Respondent ABF Freight System, Inc. ("Respondent" or "ABF") files this Answering Brief And Supplemental Motion to Strike and would show that Charging Party Manso's cross-exception is without merit and does not conform to requirements of the NLRB's Rules and Regulations:

I.

ANSWERING BRIEF

Charging Party Manso's exception to the ALJ's finding that his termination on August 17, 1989 did not violate the Act is based on a false premise, is contrary to facts established in the record, and fails to substantiate grounds for disregarding the ALJ's recommendation that

Michael Manso's termination from employment be upheld. (ALJD: 16:46-49; Manso Cross-Exception, p. 1).

A. Manso's Cross-Exception Is Contrary To Facts Established In The Record.

The following facts were proved by uncontroverted evidence at the hearing and establish that Charging Party was terminated for cause:

1. It is undisputed that Mike Manso was late for work on two (2) occasions in August 1989. On August 11, Mr. Manso arrived for work four (4) minutes late and was issued a warning letter for tardiness. Mr. Fultz visited with Mr. Manso at that time and told him that he should be aware that future instances of tardiness could result in termination. (E. Fultz ty., Tr. 440-443; RX 16).

2. Despite Mr. Fultz's warning to Mr. Manso, Mr. Manso was again late for work on August 17. His shift was to begin at 5:00 a.m. that day and it is undisputed that at 5:25 a.m., he called the terminal to report that his car had stalled on the freeway. Mr. Manso arrived at the terminal at approximately 5:50 a.m. that morning. (E. Fultz ty., Tr. 447; Manso ty., Tr. 126-130). After Manso arrived at the terminal he met with Dock Foreman Tom McNutt. Mr. McNutt filled out a corrective interview sheet, as dock foreman are required to do everytime there is a tardiness. The corrective interview sheet stated that Manso was late to work because his car broke down on the freeway and that Officer Derryl Smith of the Bernalillo County Sheriff's Department had assisted Mr. Manso. Mr. Manso refused to sign the corrective interview sheet. The meeting between Mr. Manso and Mr.

McNutt became very heated and resulted in yelling. According to Manso, he then asked for permission to speak to a Shop Steward and was given permission to do so. (M. Manso ty., Tr. 131-133).

3. Later in the morning of August 17, Manso was called to a meeting with Branch Manager Mike Long and Operations Manager Ed Fultz. When Manso was asked why he was late for work, Manso was evasive and would not explain the cause of his lateness. In a meeting with Mr. Long, Mr. Fultz, Mr. Manso and Shop Steward Walter Maestas, Mr. Maestas suggested that ABF call Officer Smith to find out what really happened. (M. Manso ty., Tr. 133-135; E. Fultz ty. Tr. 447-450).

4. Mr. Long and Mr. Fultz were suspect of Mr. Manso's explanation for his tardiness (which he had previously provided to Mr. McNutt). For this reason they followed up on Shop Steward Maestas' suggestion that they contact Officer Smith. After speaking with Officer Brads and obtaining a statement from Officer Smith, Mr. Long and Mr. Fultz concluded that Mr. Manso's explanation was not legitimate. Thus his tardiness was not excused. (E. Fultz ty., Tr. 447-452, 478, 479).

5. Manso was terminated by ABF effective August 21, 1989. (RX 17). Mr. Manso grieved his termination, and the case was heard by the Arizona-New Mexico Joint State Committee. The grievance committee overruled Mr. Manso's grievance. (M. Manso ty., Tr. 153-154).

B. The Premise of Manso's Cross-Exception Is Erroneous.

In his cross-exceptions, Mr. Manso concedes that he lied on August 17, 1989, and at the hearing in this case, when asked to explain the reason for his tardiness. Mr. Manso argues, however, that lying was not a factor in the decision to terminate him. Charging Party contends that ABF did not fire him for lying and that the ALJ's decision should be remanded to determine whether ABF's proffered reason for discharge (i.e., unexcused tardiness) was pretextual.

Mr. Manso's argument is erroneous for two reasons. First, Manso's lack of candor was inherently relevant to the decision to terminate for tardiness. Second, ALJ Maloney determined that ABF's reason for discharging Manso was legitimate and there is no issue left for the ALJ to decide.

The record shows that ABF was suspicious of Mr. Manso's excuse for being late for work, prompting ABF to investigate the matter further. ABF's suspicion that Mr. Manso's car had not overheated was validated by Officer Smith of the Bernalillo County Sheriff's Department, who pulled Mr. Manso over for speeding on August 17 while on his way to work. Operations Supervisor Ed Fultz testified that, *if* Mr. Manso had a *legitimate* excuse (i.e., if his car had truly overheated), he would not have been discharged. Specifically, the record reveals:

> ALJ Maloney: Tell me, was he being discharged for tardiness, or was he being discharged for tardiness without having a legitimate excuse?

> Mr. Fultz: Well, he was being discharged for tardiness, but obviously the fact that he did not have a legitimate excuse played upon this particular offense.
>
> ALJ Maloney: *If he had a legitimate excuse, he would not have been discharged?*
>
> Mr. Fultz: *He would not have been discharged.*
>
> ALJ Maloney: Did all three of you agree, you, Mr. Long and Mr. Johnson, agree, in effect, he was lying when he concocted this story?
>
> Mr. Fultz: I believe we did. And I will add to that if I may.
>
> ALJ Maloney: Yeh.
>
> Mr. Fultz: There was actually some discussion of his dishonesty in this particular incident.
>
> ALJ Maloney: Allright. That's all I wanted to know.

(Tr. 481-482 lines 6-25, 1-2) (emphasis supplied).

Mr. Manso further argues that his lies were not factors in the decision to terminate him because "Fultz felt it unnecessary to confront Manso with his belief that Manso lied. . . . "(Cross-Exceptions, p. 2). That is irrelevant. Mr. Fultz already had met with Mr. Manso to discuss his "excuse" and to give him an opportunity to substantiate it. (Fultz ty., Tr. 447).

It was Mr. Manso who mentioned that Officer Smith was a witness to his lateness. On the Union Steward's suggestion, the Sheriff's Department was contacted to corroborate Manso's story. After speaking with Officer Brads and obtaining a statement from Officer Smith, it

was apparent that Mr. Manso's excuse for being tardy was a fabrication. (Fultz Ty., Tr. 447-452, 478, 479). Mr. Fultz was not obligated to give Mr. Manso a second opportunity to come up with an excuse.

In summary, Manso's lie about car trouble goes to the heart of the issue; to wit, did Mr. Manso have a legitimate excuse for being late to work? The ALJ properly found that he did not. Thus, ABF had just cause to terminate Mr. Manso. ABF cannot be held to have violated sections 8(a)(3) or 8(a)(4) of the NLRA when the evidence shows that protected activity was not the reason for the discharge.

C. Manso Was Properly Disciplined Under The Collective Bargaining Agreement.

Manso contends that ABF instituted an "ad hoc" rule on discharge of preferential casuals after Manso had incurred two (2) tardys. (Cross-Exceptions, p.2). Based on the record, Manso's argument is without merit. First, evidence clearly established that the disciplinary rules applied to preferential casuals were not "ad hoc", but in fact are set forth in the collective bargaining agreement. When it comes to discipline, the Western States Agreement (Article 46, § 1) expressly allows for one warning letter and then a discharge. (Fultz ty., Tr. 444).

Second, the decision to discipline preferential casuals for tardiness or failure to report to work was made *prior to* Manso having incurred two (2) tardys (Fultz ty., Tr. 441).

Third, the Arizona-New Mexico Joint State Committee found that ABF had just cause to discharge Mr. Manso pursuant to company disciplinary rules (Manso ty., Tr. 153-154). The grievance committee also sustained the discharge of several other casuals terminated for similar violations. (Fultz ty., Tr. 427-434). *See Owens v. Texaco, Inc.*, 857 F.2d 262, 265 (5th Cir. 1988) (arbitral decision is final and binding as to rights under labor contract).

Finally, Manso's cross-exceptions do not identify evidence mandating a finding that ABF violated sections 8(a)(3) or (4) of the NLRA. In contrast, uncontroverted testimony at the hearing proved that other employees who have filed grievances and/or unfair labor practice charges have remained employed by ABF. (Hatfield ty., Tr. 360-361). Even Manso's co-Charging Party, Mr. Andy Trujillo, has remained employed without discipline.

D. Charging Party's Cross-Exception Seeks Relief That Would Be Contrary To Sound Public Policy.

Charging Party Manso fabricated an excuse for his tardiness on August 17, 1989 and he testified untruthfully about his excuse at the hearing in this case. ALJ Maloney so found, and there is no plausible basis for challenging that finding. The Act does not reward perjury and a decision allowing Charging Party to benefit by his inveracity to ABF and the Board would undermine legal process.

II.

SUPPLEMENTAL MOTION TO STRIKE

Mr. Manso's Cross Exceptions and Brief in Support do not comply with Section 102.46 (b),(c) of the NLRB's Rules and Regulations. Charging Party did not specifically identify the questions of procedure, fact, law and policy to which exception is taken. Further, Mr. Manso has not designated by page citation the portions of the Record relied upon. Finally, the Brief in Support of Exceptions improperly omits a clear and concise statement of the case. In light of the deficiencies, and for the reasons set forth in ABF's separately filed Motion to Strike Cross Exceptions and Brief in Opposition to Motion for Reconsideration, Respondent requests that Manso's Cross-Exceptions be stricken.

III.

CONCLUSION

The ALJ properly found that Mr. Manso's discharge was for cause. Similarly situated employees who twice failed to protect their start times were also terminated and the Grievance Committee sustained these decisions by ABF. There is no evidence that ABF treated Manso adversely because he filed a charge with the NLRB or because he provided testimony to the NLRB. In contrast, undisputed evidence shows that other employees who have filed charges against ABF continue to be employed by ABF.

WHEREFORE, ABF Freight System, Inc. prays that Charging Party Manso's Cross-Exceptions be denied, that

the portion of the ALJ's Decision and Order of March 21, 1990 dismissing the Complaint in Case No. 28-CA-9916 and finding that ABF did not violate section 8(a)(1), (3) or (4) when it discharged Michael Manso be approved, and that the ALJ's recommendations concerning Manso's August 1989 termination be adopted. Alternatively, ABF moves that Charging Party Manso's Cross-Exceptions be stricken for untimeliness and non-compliance with the NLRB's Rules and Regulations.

Respectfully submitted,

HAYNES AND BOONE
3100 NCNB Plaza
901 Main Street
Dallas, Texas 75202-3714
(214) 651-5000

/s/ John V. Jansonius
John V. Jansonius

ATTORNEY FOR RESPONDENT
ABF FREIGHT SYSTEM, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and copy of the foregoing instrument was served by first class United States Mail, postage prepaid addressed to the following persons on the 13th day of July, 1990:

Mr. Lewis S. Harris
Counsel for the General Counsel
National Labor Relations Board
Region 28, Albuquerque Resident Office
Patio Plaza Building
5000 Marble Avenue, N.E.
Albuquerque, New Mexico 87110

Steven V. French
Walz & French, P.A.
510 Slate Avenue, N.W.
Albuquerque, New Mexico 87102

/s/ John V. Jansonius
John V. Jansonius

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 14, 1993

Mr. John Victor Jansonius
3100 NationsBank Plaza
901 Main Street
Dallas, TX 75202-3789

Re: ABF Freight System, Inc.
v. National Labor Relations Board
No. 92-1550

Dear Mr. Jansonius:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted, limited to Question 3 presented by the petition.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

EXHIBIT R 18

I stopped Mike Manso between 530 and 540 AM on Thursday morning 8/17/89 on I40 at approximately the Louisianna exit. I paced him for 3 miles between 85 and 95 miles per hour weaving in and out of traffic. I stopped Mr. Manso and talked to him and verified it was him through his drivers license. Mr. Manso left. I followed him past Carslile and there was no evidence of car trouble.

/s/ Derryl Smith D1/c #D581

WESTERN STATES AREA
SUPPLEMENTAL
AGREEMENTS

COVERING

PART I

Common Clauses

PART II

Pick-Up and Delivery
Local Cartage and Dock Workers

PART III

Over-the-Road Motor Freight

PART IV

Automotive Shop and Truck Servicing

PART V

Office Employees

For the Period of

APRIL 1, 1988

thru

MARCH 31, 1991

G.C. 22

* * *

ARTICLE 46

GENERAL DISCHARGE OR SUSPENSION

Section 1.
Cause for Discharge or Suspension

Subject to the provisions of Article 8 of the National Agreement the Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Local Union affected; except that no warning notice need be given to an employee before he is suspended or discharged if the cause of such suspension or discharge is (a) Dishonesty; (b) Drunkenness; (c) Recklessness resulting in a serious accident while on duty; (d) The carrying of unauthorized passengers; (e) Unprovoked physical assault on an employee or customer; (f) Selling, transporting or use of illegal narcotics and/or controlled substances while on duty; (g) Willful, wanton or malicious damage to the Employer's property; (h) Proven negligence resulting in serious equipment damage while on duty; (i) For the specific reasons provided under Article 35, Sec. 3 of the National Master Freight Agreement.

Section 2.
Warning Notices

(a) A warning notice shall not remain in effect for a period of more than nine (9) months from the date of occurrence which gave rise to such warning notice. Warning notices, to be considered as valid, must be issued

within ten (10) days exclusive of Saturday, Sunday and holidays after the occurrence of the violation claimed by the Employer in such warning notice. Warning letters shall be specific, not general, in nature as to alleged violation (i.e., time, date, place, and nature of violation).

Discharge or Suspension

(b) Discharge or suspension must be by proper written notice to the employee and the Union affected within ten (10) days exclusive of Saturday, Sunday and holidays of the occurrence of the violation claimed by the Employer as the basis for discharge or suspension, except where dishonesty is involved. In cases where dishonesty is involved the discharge or suspension notice must be within twenty (20) calendar days of the Employer obtaining verifiable evidence of the alleged dishonesty. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove an injustice has been done an employee, he shall be reinstated. The Joint State Committee or the Joint Western Area Committee shall have the authority to order full, partial or no compensation for time lost.

When an employee is suspended, or where a discharged employee is returned to work by decision of any grievance committee or umpire, the Employer shall pay the applicable Health and Welfare and Pension contributions so that there is no break in coverage.

The Joint State Committee or the Joint Western Area Committee shall have the authority in its hearing process to accept or reject any or all arguments pertaining to the

issues in each case, including but not limited to timeliness, whether or not proper before the Committee, etc., and further, to order full, partial, or no compensation for time lost.

(c) At the option of an individual employer, a discharged or suspended employee who is not subject to the specific reasons for discharge set forth in Section 1 above, may be worked during the interim period pending the final adjudication of his protest to such discharge or suspension.

Section 3.
Protest Procedure

(a) Warning notices must be protested in writing to the Employer within ten (10) days exclusive of Saturday, Sunday and holidays except as hereinafter provided.

The Joint State Committees presently hearing warning letters shall discontinue such practice effective 7-1-88. This practice shall be subject to review after 7-1-89 and may be grieved thereafter if abused by the Employer. The Local Union and the Employer agree all warning letters shall be considered as automatically protested and shall not be heard until such time as they are used as a basis for suspension or discharge within the effective time period.

(b) Protests to suspension or discharge must be made in writing to the Employer within ten (10) days exclusive of Saturday, Sunday and holidays. If the matter is not resolved to the satisfaction of the parties, either party may file the case with the Joint State Committee as

provided in Article 45, Section 1, of this Supplemental Agreement.

(c) If the employee involved is not within his home terminal area when the warning notice, suspension or discharge is made, the ten (10) day periods referred to in sub-sections (a) and (b) above shall start to run from the date of his return to his home terminal.

Section 4.

Transportation Home

Any employee discharged away from his home terminal shall be provided the fastest available transportation to his home terminal at the Employer's expense.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 28

ABF FREIGHT SYSTEM, INC.

AND

MICHAEL MANSO, an Individual — Case 28-CA-9500

ANDY TRUJILLO, an Individual

MICHAEL MANSO, an Individual — Case 28-CA-9916

TRANSCRIPT OF PROCEEDINGS

Tuesday, January 9, 1990

5000 Marble Avenue, Northeast
Albuquerque, New Mexico

APPEARANCES:

The Hearing Officer:
WALTER H. MALONEY
National Labor Relations Board
Division of Judges
1717 Pennsylvania Avenue,
Northwest
Washington, DC 20006

For the NLRB:
LEWIS S. HARRIS, Esquire
Field Attorney
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For ABF Freight:
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HAYNES & BOONE
3100 NCNB Plaza
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Also present:

MICHAEL MANSO
720 Muriel, Northeast
Albuquerque, New Mexico 87123

ANDY TRUJILLO
2815 Dakota, Northeast
Albuquerque, New Mexico 87110

HOWARD L. JOHNSON
Vice-President, Industrial
Relations
ABF Freight System, Inc.
301 South 11th Street
Fort Smith, Arkansas 72902

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WITNESSES FOR THE RESPONDENT:

HOWARD L. JOHNSON

EXHIBITS

		MARKED	ADMITTED
GENERAL COUNSEL'S:			
1(a)	through 1(hh) – Formal documents	8	9
2 –	Minutes of the Arizona-New Mexico Joint State Committee Meeting held Wednesday & Thursday, June 29 & 30, 1988, Howard Johnson Plaza (formerly Continental Inn) – Albuquerque, New Mexico	12	15
3 –	Letter dated May 2, 1989 to Michael Manso, from Ed Fultz	113	115
RESPONDENT'S:			
1 –	Letter dated May 20, 1988 to Member, from Fred J. Schrank	16	17

2 –	Articles 45 and 60 of the Western States Area Supplemental Agreements Covering Part II, Pick-Up and Delivery, Local Cartage and Dock Workers, for the Period of April 1, 1988, through March 31, 1991	17	17
3 –	Memorandum of Understanding Regarding Preferential Casuals	17	18
4 –	Letter dated June 20, 1988 to Mike Manso, from Mike Long Letter dated June 20, 1988 to Andy Trujillo, from Mike Long Letter dated June 20, 1988 to Jerry Miera, from Mike Long Letter dated June 20, 1988 to Arnold Haynes, from Mike Long Letter dated June 20, 1988 to Albert Miranda, from Mike Long Letter dated June 20, 1988 to Chad Sullins, from Mike Long	18	18

* * *

Also present:

MICHAEL MANSO
720 Muriel, Northeast
Albuquerque, New Mexico 87123

ANDY TRUJILLO
2815 Dakota, Northeast
Albuquerque, New Mexico 87110

HOWARD L. JOHNSON
Vice-President, Industrial
Relations
ABF Freight System, Inc.
301 South 11th Street
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EXHIBITS

		MARKED	ADMITTED
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4 –	Letter dated October 5, 1988 to Mike Prando, from Bob Herrington	300	301
4(a) –	Letter dated January 25, 1989 to Mike Prando, from Bill Lahman with attachment	301	302
4(b) –	Letter dated August 8, 1989 to Mike Prando, from Ed Fultz	302	303
4(c) –	Letter dated November 3, 1988 to Mike Prando, from Walter White with attachment	303	303
5 –	Letter dated August 22, 1988 to Charlie Estrada, from Steve Murphy	303	304
6 –	Employee Discussion Report Name of Employee – Shane Kuhn with attachment	304	304

7 –	Employee Discussion Report Name of Employee – Oscar Juan Montalvo with attachment	304	305
8 –	Employee Discussion Report Name of Employee – Mike Marquez with attachment	305	305
9 –	Employee Discussion Report Name of Employee – Robert Lovato with attachment	305	306
10 –	Letter dated October 5, 1988 to Jeff Motter, from Tom McNutt with attachment	306	306
10(a) –	Letter dated October 20, 1988 to Jeff Motter, from Walter White with attachment	306	307
10(b) –	Letter dated April 26, 1989 to Jeff Motter, from Ed Fultz with attachment	307	307
10(c) –	Letter dated June 1, 1989 to Jeff Motter, from Ed Fultz	307	308

23 –	Western States Area Supplemental Agreements Covering Part I, Common Clauses; Part II, Pick-Up and Delivery Local Cartage and Dock Workers; Part III, Over-the-Road Motor Freight; Part IV, Automotive Shop and Truck Servicing; Part V, Office Employees, for the Period of April 1, 1988, through March 31, 1991	316	317
25 –	Affidavit (not attached)	373	
26 –	Employee Discussion Report Name of Employee – Mike Manso	466	504

EXCERPTS OF KYLE BEESON

* * *

[p. 404] having been first duly sworn according to law, upon his oath testified as follows:

MR. MALONEY: Be seated, give your name and address to the reporter.

THE WITNESS: My name is Kyle Beeson, and my address is 5727 Lost Dutchman Street, Northeast.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Where do you work, Mr. Beeson?

A. I work at ABF Freight.

Q. What is your job there?

A. Operations supervisor.

Q. How long have you worked at ABF?

A. Been with the company a total of approximately five and a half, six years.

Q. Were you involved in the decision to quit using Michael Manso as a casual on the preferential hire list last summer?

A. No, I wasn't.

Q. Do you recall when Mr. Manso returned to work in approximately late April or early May of 1989?

A. Yes.

Q. At that point in time did you have any [p. 405] conversations with Mr. Manso?

A. Pertaining to –

Q. Well, did you tell Mr. Manso that ABF was out to get him?

A. No, I did not.

Q. Did you say to Mr. Manso, "Let's see how long it takes ABF to get you this time"?

A. No.

Q. Did you ever threaten Mr. Manso that he was going to be terminated or disciplined in some manner?

A. No.

MR. JANSONIUS: Nothing else, Your Honor.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Beeson, my name is Lewis Harris, and I'm an attorney with the National Labor Relations Board. I'm going to ask you a couple questions.

When Mr. Manso came back to work, you knew that he had filed an unfair labor practice charge against the company, didn't you?

A. No.

Q. You didn't know that?

You knew that he filed a grievance against the company?

A. Yes.

* * *

[p. 407] A. I really didn't know how far it went.

Q. You knew that he was coming back as a result of having filed a grievance, right?

A. Yes. Yes.

Q. Is the answer yes?

A. Yes.

Q. Did you have any discussion with him when he came back to work about his coming back to work?

A. Just said, "Welcome back."

Q. That's the entire conversation you had with him about his having gotten back to work?

A. (Witness nods head.)

Q. You have to say yes or no.

A. Yes.

Q. You did know that he had been terminated by ABF, right?

A. Yes.

MR. HARRIS: That's all I have.

MR. MALONEY: Thank you.

Do you have anything further?

MR. JANSONIUS: No, Your Honor, I do not.

MR. MALONEY: Step down.

MR. JANSONIUS: If I might have a couple minutes, I do have two witnesses out in the hallway, and –

* * *

EXCERPTS OF RONALD G. FORD

* * *

[p. 384] MR. JANSONIUS: They're not going to take long. And I've instructed Mr. Fultz to come down with them.

MR. MALONEY: So you can take care of Fultz this morning, as well?

MR. JANSONIUS: I believe so.

MR. MALONEY: All right. So there will be Fultz and these two people?

MR. JANSONIUS: That's correct.

MR. MALONEY: All right. So this afternoon we'll have Herrington and this policeman?

MR. JANSONIUS: That's correct. And it's possible that Mr. Fultz will spill over until this afternoon.

Your Honor, we've told everybody to get here ASAP and be available.

MR. MALONEY: Call your next witness.

MR. JANSONIUS: Your Honor, I call Ron Ford.

MR. MALONEY: Raise your right hand.

RONALD G. FORD

having been first duly sworn according to law, upon his oath testified as follows:

[p. 385] MR. MALONEY: Be seated, give your name and address to the reporter.

THE WITNESS: My name is Ronald G. Ford, I live at 9010 Alexis Avenue, Southwest.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Where do you work, Mr. Ford?

A. ABF.

Q. How long have you worked there?

A. Three years.

Q. What is your present position at ABF?

A. I'm an operations supervisor.

Q. How long have you been an operations supervisor?

A. About two years.

Q. So you were an operations supervisor in the summer of 1989?

A. That's correct.

Q. Did you participate in a phone call to Mr. Michael Manso on June 9 of this past summer to call him to work?

A. Yes, sir.

Q. Would you tell us about that?

A. It was a normal calling. I called all the casuals that I needed for that shift, and when we – [p. 386] when we got to Mike Manso, the teamster who was calling him,

and I was, you know, on the phone listening, there was no answer.

MR. MALONEY: Who called?

THE WITNESS: I believe it was Mr. Motter, Jeff Motter.

MR. MALONEY: Did he do the calling, or did you do the calling?

THE WITNESS: Well, would you like me to explain the system that we utilize?

MR. MALONEY: I'd like you to tell me the answer to my question.

THE WITNESS: Sorry.

MR. MALONEY: Who called? Who did the dialing?

THE WITNESS: Jeff did the dialing.

MR. MALONEY: And who listened in?

THE WITNESS: I did.

MR. MALONEY: So he was actually – you were actually – you actually were a spectator at the conversation?

THE WITNESS: A spectator with the conversation.

MR. MALONEY: All right. Maybe that's an improper way of putting it.

[p. 387] These other people that he called, did he do the dialing?

THE WITNESS: Uh-huh.

MR. MALONEY: Did he speak to the individuals in question?

THE WITNESS: No.

MR. MALONEY: Who did?

THE WITNESS: I do.

MR. MALONEY: You do the speaking, and he listens in?

THE WITNESS: No. I have the receiver in my hand.

MR. MALONEY: Yeah.

THE WITNESS: I watch him as he dials the number.

MR. MALONEY: Yeah.

THE WITNESS: And then when the phone is – you know, when they answer, I'm the one that's doing the calling.

MR. MALONEY: Does he listen in to the conversation?

THE WITNESS: He doesn't listen to the conversation unless, of course, there's a problem. You know, like if there's no answer, then he would listen to that, because he has to verify that there's no answer.

[p. 388] MR. MALONEY: All right. Go ahead.

Q. (BY MR. JANSONIUS) And did he verify that there was no answer on that occasion?

A. Yes, sir.

Q. Did he tell you that he thought he might have misdialed?

A. No, sir.

MR. JANSONIUS: No further questions.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Ford, my name is Lewis Harris, I'm an attorney with the National Labor Relations Board, and I think I'd like to ask you a few questions.

A. Okay.

Q. Have there been cases that you're aware of where a number has been misdialed when you're calling casuals to work?

A. That I'm aware of, sir?

Q. Yes.

A. I think so.

Q. And if that is the case, do you allow another dialing be made of the correct number?

A. Yes, sir. The – may I?

The first call is considered invalid at that point, because the individual feels that the right —

* * *

[p. 395] A. We – the first call is – that call is considered invalid. Yes, sir.

Q. Do you let him dial again?

A. Yeah.

Q. And you don't recall on the morning of June 9, last year, when a call was made to Mr. Manso that Jeff Motter said, "I think I made a mistake, I want to – can I try it again?"

A. No, sir.

Q. You don't remember that?

A. I don't – he didn't say it.

Q. Did you make out some kind of a report when you learned that Mr. Manso had not answered the call?

A. The call sheet that we utilize for the verification process is the report.

Q. Where does that go after you use it for calling?

A. It goes to the operations manager.

MR. MALONEY: Who is that?

THE WITNESS: Mr. Ed Fultz.

MR. MALONEY: Then is a disciplinary warning of some kind issued?

THE WITNESS: Sir, I – I don't know. I presume so, but I don't know. That's out of my hands.

Q. (BY MR. HARRIS) How many calls do you

* * *

[p. 400] would say that I called nine that day and nine for the three other days that I worked, because I work four on, four off.

MR. MALONEY: Next question.

Q. (BY MR. HARRIS) Did you work from June of '89 until the week before the holidays as an operations supervisor?

A. I believe that's correct. I may have filled in in city dispatch one other time between then and now.

Q. And during that period, from June until a week before the holidays, you were making calls of 15 percenters and preferential casuals and other casuals to come to work?

A. Yes, sir.

Q. And on some of those occasions do you recall that the teamster who was dialing said to you that he thought that he may have dialed the wrong number?

A. No, sir. I don't recall that happening on any of my call periods.

Q. On any of your calls?

A. I don't recall any of that happening. No, sir.

Q. Why do you have such a clear recollection [p. 401] of the call that was made to Mr. Manso on June 9 of last year?

A. Because a verification is, I think, serious enough to where it will bring it – it will keep it in your mind.

MR. MALONEY: Were these other calls that you made that week verified calls?

THE WITNESS: No. I don't think so, sir. I mean this – no. I mean verification is not something that happens very often. Normally you make your calls and people are there and you bring them to work.

Q. (BY MR. HARRIS) Well, you make a verification on all preferential casuals, don't you?

A. Well, yes, sir. But I mean – when I say verification, what I mean to say is that a verification that somebody was not there to receive the call. We term the phrase he was verified because he wasn't available to work.

MR. MALONEY: Are you saying in each and every one of the other calls you made that evening you reached the individual who was called?

THE WITNESS: I believe so. I believe so.

Q. (BY MR. HARRIS) There have been a number of employees – you're aware, aren't you, that there have been a number of employees on the dock who have

* * *

[p. 413] EXCERPTS OF ED FULTZ

* * *

Q. I don't know if you used those exact words, but –

A. Something on that order, in that vein.

MR. HARRIS: That's all I have.

MR. JANSONIUS: Nothing else, Your Honor.

MR. MALONEY: Thank you very much. Step down.

MR. JANSONIUS: Your Honor, my next witness is Ed Fultz. He is going to be on the witness stand considerably longer than these other two gentlemen, or three gentlemen.

MR. MALONEY: Well, we'll see where we go with it. Bring him in.

Come forward, please.

THE WITNESS: Where am I supposed to go?

MR. JANSONIUS: Ed, you're going to be sitting right over here.

MR. MALONEY: Raise your right hand.

ED FULTZ

Having been first duly sworn according to law, upon his oath testified as follows:

MR. MALONEY: Be seated, give your name and address to the reporter.

[p. 414] THE WITNESS: My name is Ed Fultz, I live at 1844 Tramway Terrace Loop, Northeast, Albuquerque, New Mexico.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. You work at ABF; is that right, Mr. Fultz?

A. Yes, I do.

Q. What do you do there?

A. I'm the operations manager.

Q. How long have you worked for ABF?

A. Five and a half years.

Q. Tell us a little bit about your employment background.

A. Okay. Prior to becoming operations manager, I was an operations supervisor for –

MR. MALONEY: How long have you been operations manager?

THE WITNESS: Since January of '89.

MR. MALONEY: Go ahead.

THE WITNESS: Prior to that I was operations supervisor, from the time I joined ABF until that time. Prior to that I was operations manager for a freight line that went bankrupt, ICX. I was with ICX for approximately five years, also. Prior to that I taught school for ten years.

* * *

[p. 446] we're making it harder in that we're applying the strict letter of the contract.

MR. MALONEY: I know that. But the question is why.

THE WITNESS: Because this is a brand new group of employees that we have never had before, and we want to establish that line of discipline right from the very beginning.

I don't know how else to respond to you, Judge.

MR. MALONEY: Next question.

Q. (BY MR. JANSONIUS) You discontinued using Mr. Manso about a week after that August 11 incident; is that correct?

A. That's correct.

Q. And why did you discontinue using him at that time?

A. Mike was late again.

Q. Would you tell us what happened that day?

A. Okay. When I got there, I was told that Mike was late. And at that point in time I started asking what the situations were. And I suppose that what I remember is that he called in at approximately 5:25, indicated that –

MR. HARRIS: Excuse me, Your Honor. I [p. 447] would suggest that the witness give some foundation for the testimony in regard –

MR. MALONEY: What do you mean foundation?

MR. HARRIS: His information. Who – he said he supposes –

MR. MALONEY: All right.

What time did you report to work; and who told you what?

THE WITNESS: I got to work at 7:30. Okay? Like I said, every time that somebody is late there is supposed to be an Employee Discussion Report written up. There was one written up. It was in my basket.

MR. MALONEY: Who had –

THE WITNESS: Tom McNutt had written the Employee Discussion Report. Joe Kineer, another supervisor, had taken a call from Mike at 5:25 and had clock punched that call in from Mike stating that he had car trouble and would be late to work.

In looking at the Employee Discussion Report, my boss, Mike Long, and myself called Mike into the office, and I believe that there was a union steward present, and asked him to tell us about the circumstances.

Also, on the employee verification – or no, excuse me – the Employee Discussion Report there [p. 448] was a note there that a deputy sheriff had also stopped and offered Mike some aid to his vehicle. But that wasn't – that was all very brief.

So we called Mike in and asked him what were the circumstances.

He said he broke down, that Officer Derryl Smith had stopped and offered him aid, if he could take him to the phone. And he declined, and he ran across the mesa. He had broken down – I can't remember the exact places right now. I think it was somewhere west of San Pedro, somewhere in that area, or west of Louisiana, in that area. Anyhow, he ran across the mesa to a phone booth at a defunct station on Carlisle, and that's where he said he called in from, at 5:25, which is when we had that clock punched.

I asked Mike what time he left home that morning.

He indicated that he did not feel that the time that he left home was relevant to what we were talking about and didn't want to discuss it.

There was some other discussion, the details of which I do not remember that clearly.

Mike indicated that he wanted to –

MR. MALONEY: Do you know how he got to work?

[p. 449] THE WITNESS: I do not know exactly how Mike got to work. No. I can assume how I think he got to work.

MR. MALONEY: How do you assume he got to work?

THE WITNESS: I assume he drove his car on in after some investigation. At that point in time I did not know how he got to work.

MR. MALONEY: Did you find out that that was, in fact, the way he got to work?

THE WITNESS: That's the way I believed. Yes, with subsequent looking into the situation.

At that point in time the discussion pretty much ended, and Mike Long, the boss, said, "Mike, we're going to check into what you said."

And that's where we left it at that point.

MR. MALONEY: Did you think that was a phony excuse?

THE WITNESS: I felt it was evasive. Exactly. I did –

MR. MALONEY: You don't think he had a breakdown?

THE WITNESS: We were suspect he did at that point in time.

Oh, he also said –

[p. 450] MR. MALONEY: You suspected that he did or did not have a breakdown?

THE WITNESS: That he did not.

MR. MALONEY: You don't think he broke down at all?

THE WITNESS: No.

MR. MALONEY: Okay.

THE WITNESS: At that time.

MR. MALONEY: Did you find out subsequently whether he did or did not?

THE WITNESS: Yes.

MR. MALONEY: What did you find out subsequently?

THE WITNESS: That he didn't.

MR. MALONEY: He did not have a breakdown, no breakdown at all?

THE WITNESS: The way we understood it from what we found out.

MR. MALONEY: He had no trouble at all?

THE WITNESS: (Witness shakes head.)

MR. MALONEY: All right. Go ahead.

Q. (BY MR. JANSONIUS) Were you ever given any repair records on his car?

A. No.

Q. What did you do to follow-up on his [p. 451] statement that his car had broken down?

A. Subsequent to that my boss went out and checked on the freeway to see if the car was still there, and there was no car in that area.

We also called the deputy sheriff, and I got an Officer Brads at the dispatch, and I related to Officer Brads that I'd like to speak to Officer Smith, get a message to him, if you would.

And he got a message to him, and there was some two-way conversation. And evidently I had asked Officer Brads if he would ask Officer Smith if he had rendered aid to Mike.

And he said no, he had not rendered aid to Mike, that he stopped him for speeding.

Subsequent to that we made an effort to go and get a statement from Officer Smith, which we did.

MR. MALONEY: How did you go about doing that?

THE WITNESS: We contracted again the deputy sheriff's department, and this was later.

MR. MALONEY: What do you mean later?

THE WITNESS: Well, that particular day, after that discussion with Officer Brads, we felt that Mike had not broken down based on that two-way discussion between Officer Brads, Officer Smith and [p. 452] myself, that Mike had been stopped for speeding and not for a breakdown.

So it was the next day afternoon that I terminated Mike based upon that information. Subsequent to that, because it was going to grievance proceeding, we felt that we probably needed a statement from Officer Smith.

So we contacted Officer Smith. Went to T-VI, where he was teaching an academy class, young recruits. We talked to him at that time. He had a class going on, there was a lot of –

MR. MALONEY: All right. But you've got a statement from him.

THE WITNESS: Right. We've got a statement from him.

MR. MALONEY: All right. Next question.

Q. (BY MR. JANSONIUS) Is Respondent's Exhibit 18 a copy of that statement?

A. Yes.

Q. Were you present – I'm sorry.

A. I was present. In fact, Officer Smith was semi-conducting this class with another deputy at that time, so there was a lot of confusion going on.

Q. Did you see Officer Smith sign the statement?

[p. 453] A. Oh, he definitely signed it and took a copy of it, I might add.

Q. How did you know that that was Officer Smith?

A. Well, we had trouble finding the portable classroom that this class was being conducted in, and we had stopped at one of the other offices, and they directed us on how to get there and said there would be some people looking for us. And a deputy and a couple of the recruits met us and took us to Officer Smith, introduced us to him, and that's how we know that it was him. Plus he had on a name tag.

Q. Is there any difference between this statement as you see it now and as it was presented to you at the time officer Smith signed it?

A. No.

MR JANSONIUS: Your Honor, I offer Respondent's Exhibit 18 into evidence.

MR. HARRIS: I object, it's hearsay.

MR. JANSONIUS: Your Honor, it's not hearsay, because we're not offering it for the truth of what's being

asserted, we're offering it for the purpose of showing what ABF knew and relied upon in deciding to terminate Mr. Manso.

MR. MALONEY: He said he didn't have that [p. 454] until after he had fired him.

MR. JANSONIUS: Well, it's still relevant to the company's ultimate decision not to put him back to work in connection with the grievance he filed.

MR. MALONEY: Rejected. It's hearsay.

Q. (BY MR. JANSONIUS) Had you spoken to Officer Smith before a decision was made to let Mr. Manso go?

A. You know, I don't know if I talked to him directly or if it was through Officer Brads before we made – no. I had not talked to Officer Smith directly when I made the decision to discharge Mike.

Q. Why did you discharge Mr. Manso?

A. We discharged him for being tardy a second time with what we felt at that time was not just cause.

MR. MALONEY: If he had had a breakdown, and you were satisfied that he truly had broken down on the freeway –

A. He would not have been discharged?

Q. He would not have been discharged?

A. No, sir, he would not.

MR. JANSONIUS: Your Honor, I pass the witness.

MR. MALONEY: Would this be an appropriate time for a recess?

* * *

[p. 456] here, Mr. Fultz?

All right. This hearing will be in order.

Mr. Fultz, I remind you, sir, that you're still under oath.

Do you want to examine him?

MR. HARRIS: Yes.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Fultz, my name is Lewis Harris, and I'm an attorney with the National Labor Relations Board, and I'd like to ask you some questions.

Since the preferential list was established in April of 1989, how many employees have been taken from that list and made regulars?

A. None.

Q. And since that list was established in April of 1989, how many preferential hires on that list have been discharged?

A. It's either four or five. The exact number I don't remember. I'd have to count through them.

Five.

Q. Five.

And at the present time you say there are seven on the list?

A. That's correct.

* * *

[p. 463] is?

A. The policy – yes. It would come from there and from branch manager and from our regional vice-president and through their discussions.

Q. And would you think that Mr. Johnson would be competent to inform you of what the disciplinary policy of the Albuquerque terminal is?

A. Certainly.

Q. And with regard to – speaking about policy, there was one that you weren't aware of at the time that Mr. Manso was late the second time; isn't that true?

A. At that time, that is correct. The first time, when he was late the first time, I was not aware of what the established policy was going to be as far as a second tardy was concerned.

Q. So you consulted –

MR. MALONEY: Well, are you saying that up until that time there was no established policy?

THE WITNESS: He was the first preferential casual we had ever be tardy.

MR. MALONEY: So up until that time there was no established policy?

THE WITNESS: That policy had not been established at that time.

* * *

[p. 470] A. My boss asked him a couple of questions. I don't –

Q. Your boss?

A. My boss.

Q. Who was that?

A. He was also there.

Q. Oh, I didn't hear that.

A. Yeah. Mike Long was also present.

Q. At this initial conference?

A. Yes.

Q. Okay. What did Mr. Long ask him?

A. I don't remember what the questions were. I really don't. I can't recall.

Q. Was there anything else that happened in the meeting that you remember?

A. Not at that time. I remember that Mike was the one who ended the meeting and said that – I'm talking about Mike Long, branch manager. He ended the meeting basically stating that he wanted to check out some things that were said. And that was the end of the meeting.

MR. MALONEY: Was anything said about him being stopped or slowed by a police officer for speeding?

THE WITNESS: Not at that time, because we [p. 471] didn't know anything about that at that time.

Q. (BY MR. HARRIS) And Mr. Manso didn't say anything about that?

A. No, he did not.

Q. What happened next?

A. Wait.

Q. Excuse me.

A. Wait, wait, wait. That's not true. Let me think a second. These – all these other conversations, and it's been a long time – no. He did not say anything about being stopped for speeding. He did not. It was car broken down. Speeding was not mentioned in that meeting.

Q. Okay. What happened next? What did you do next about this incident?

A. I called Officer Brads, and – my branch manager first had gone and checked the freeway to see if the vehicle was there. The vehicle was not there.

MR. MALONEY: You mean Mr. Long got in his car and went out on the freeway to look for this automobile?

THE WITNESS: That is correct.

Q. (BY MR. HARRIS) Did he ask – excuse me. I want to go back a bit.

Did Mr. Long ask Mr. Manso exactly where it [p. 472] was?

A. Yes. He told us where it was. He told us it was between – somewhere between Louisiana and San Pedro or San Pedro and Carlisle. I can't remember exactly. But those street names come to memory. We're talking, you know, some time has passed here.

Q. Did he say which direction he was heading?

A. Yeah. It was west, of course.

Q. That's what he said? Excuse me?

A. Yes.

Q. And he gave the location of the automobile at that meeting with Mr. Long?

A. (Witness nods head.)

Q. You'll have to answer –

A. Within that area. Within the area enough that if Mike felt if it was there it would still be there.

Q. Well, you don't know what Mike felt.

A. That's true. I don't. I'm just relaying what –

Q. The next thing you know Mr. Long is off – he tells you he's going to go look for the car? Is that what he says?

A. He says, "I'm going to see if that vehicle is there, if there is a vehicle there."

[p. 473] Q. Then what happened next?

A. I called the deputy sheriff's – or the sheriff's department and talked to the on-duty officer, dispatcher, which was Officer Brads. I relayed that information that I

would like to speak to Officer Smith about an incident of stopping an employee of ours that morning and see if he could shed any light on it.

He called back –

Q. Excuse me. At this point you had developed some suspicions.

A. Yes.

Q. Why?

A. From that meeting that morning with Mike, he was evasive with some of the questions we had asked, and we felt that it wasn't a truthful statement that he was making.

Q. The one question that you said that he didn't think he had to answer, it was not relevant, was when he had left home, right?

A. Um-hum.

Q. What other questions did he –

A. Mike asked some. I do not remember what those questions were.

Q. So you developed this suspicion and called officer – or sheriff, Deputy Sheriff Brad, did you say?

[p. 474] A. Brads.

Q. Brads? Is that B-r-a-d-s?

A. I believe that's correct. I –

Q. And what was your conversation with Deputy Sheriff Brads?

A. It was basically a query if he would find out from Officer Smith if he had, in fact, stopped and rendered aid to one of our employees that morning.

He called back and indicated to me at that time that Officer Smith had not rendered aid, that he had stopped Mike for speeding. And there may have been a couple of other statements that were made at that time, but that was it.

Q. Let's go back to the meeting again with Mr. Long and the union steward, Mr. Manso and yourself.

Did Mr. Manso state then to you and Mr. Long that the officer had – he had asked the officer for help with his car trouble? Is that what he said to you?

A. No.

MR. MALONEY: Tell me, did you inquire from Mr. Manso what the nature of his car trouble was?

THE WITNESS: Yes, I did.

MR. MALONEY: What did he say?

THE WITNESS: He told me that the radiator, [p. 475] the heater core on the radiator – heater core, radiator, under there broke and that there was water, hot water, steam all over the whole inside of the car, that the car was completely totally fogged up. He couldn't see a thing out of it. And he had just been driving it into the ground to try to get to work.

MR. MALONEY: But he didn't indicate how he got to work?

THE WITNESS: I'm sure that he did.

MR. MALONEY: What did he say?

THE WITNESS: But I don't remember. I don't remember that part of it.

MR. MALONEY: Did you inquire as to how he made it to work or what became of the vehicle after it had overheated?

THE WITNESS: That was all a part of that conversation, I'm sure, because, of course, I would have been interested in how he got to work and that type of thing.

MR. MALONEY: Well, what did he say about what he did with the vehicle and how he got to work?

THE WITNESS: Well, it was my understanding that the vehicle was still there, because it wouldn't run. It was so overheated and hot that it just quit.

MR. MALONEY: Did he say how he got to [p. 476] work?

THE WITNESS: I really don't remember that part of it.

MR. MALONEY: Did he say –

THE WITNESS: I can say way I assume he said, but I don't remember.

MR. MALONEY: Did he say he called his wife and asked –

THE WITNESS: Yes, he did. He did say – no. Wait a minute. You've got to remember that these conversations have taken place at many different times along the line.

MR. MALONEY: I'm talking about the first conversation.

THE WITNESS: I know that, and that's why I'm trying to remember.

MR. MALONEY: All right. Go ahead, Mr. Harris.

Q. (BY MR. HARRIS) What happened after your conversation with Deputy Sheriff Drabs?

A. Brads.

Q. Brad, excuse me. I'm sorry.

A. Brad or Brads. Deputy Brads, I believe.

Nothing happened until the next afternoon, and the next afternoon the determination was made [p. 477] between the branch manager and myself over discussing this, based on the information from the deputy sheriff and what Mike had told us in the meeting, that we would terminate, and we did.

Q. Now, you say the next afternoon.

Wasn't it the same afternoon?

A. No. As a matter of fact, it was not. It was the next afternoon.

MR. MALONEY: So you allowed him to finish the shift that he had come in to work?

THE WITNESS: Yes, sir. He did finish that shift.

MR. MALONEY: Do you know how he got home?

THE WITNESS: No, sir, I don't.

MR. HARRIS: What was your question, sir?

MR. MALONEY: I just asked if he know how Mr. – Mike had gotten home, and he said no, he didn't.

Q. (BY MR. HARRIS) What was the information that Deputy Sheriff Brads had given you again?

A. That Officer Smith had stopped him – excuse me – had stopped him for speeding.

Q. Did you speak with Mr. Manso again about the matter after this information?

A. Mike called me the next morning asking questions – no. It wasn't the next morning. It was [p. 478] later in the afternoon, because I had terminated him – he called in, and I terminated – told him at that time that he was going to be released, or he would be discharged for being tardy.

And he called me, I believe, again the next morning after that. I told him his final payroll check would be available for him to pick up. He came in and picked up his checks, and there was a brief discussion over why he was being discharged, and I told him he was being discharged for tardiness.

Q. So after you received the information from Deputy Sheriff Brads, nothing was done until the following afternoon when you had a meeting with him?

A. No. It was done the following afternoon when Mike called in. We had had meetings. I discussed this situation with the branch manager.

Q. On the same day that he was late?

A. That's correct.

Q. And the two of you just discussed the matter?

A. Oh, I'm sure that there was involvement with Howard.

Q. That's M Johnson?

A. Mr. Johnson, right.

Q. From Fort Smith?

* * *

[p. 481] discharged.

Q. What did he say, and what did you say?

A. I told him that he was being discharged for tardiness. I was rather – I was rather noncommital other than that point.

MR. MALONEY: Tell me, was he really being discharged for tardiness, or was he being discharged for tardiness without having a legitimate excuse?

THE WITNESS: Well, he was being discharged for tardiness, but obviously the fact that he did not have a legitimate excuse played upon this particular offense.

MR. MALONEY: If he had a legitimate excuse, he would not have been discharged?

THE WITNESS: He would not have been discharged.

MR. MALONEY: Did all three of you agree, you, Mr. Long and Mr. Johnson, agree, in effect, he was lying when he concocted this story?

THE WITNESS: I believe we did.

And I will add to that, if I may.

MR. MALONEY: Yeah.

THE WITNESS: There was actually some discussion of his dishonesty in this particular incident.

[p. 482] MR. MALONEY: All right. That's all I wanted to know.

Q. (BY MR. HARRIS) Did you confront Mr. Manso with those allegations?

A. No. I did not, because we proceeded to terminate for tardiness.

Q. You didn't give him an opportunity to defend himself against your allegation of dishonesty?

A. We did not have any further discussion on it.

Q. When did you contact the Deputy Sheriff Smith? Was that before the grievance committee meeting?

A. Yes, it was.

Q. Is this progressive discipline policy that you talked about applied with respect to different types of offenses by employees? In other words, if you do not understand my question, can someone be late and get a warning and then not respond to a call and also get a warning because of a different type of offense than being late?

A. That is correct.

Q. So you categorize offenses –

A. That is correct.

Q. – by character, by –

A. That is correct.

* * *

EXCERPTS OF CHRISTOPHER LOVATO

* * *

[p. 378] A. Yes.

Q. Was there any adjustment made to provide for the fact that regulars had been hired in the intervening months, from June to April?

A. Not to my knowledge.

MR. HARRIS: That's all I have.

MR. JANSONIUS: Nothing further, Your Honor.

MR. MALONEY: Thank you. Step Down.

Do you want to recess?

MR. JANSONIUS: Just for a couple minutes. We're informed that our next witness is on his way.

MR. MALONEY: All right. We'll take a five-minute recess.

(Proceedings in recess.)

MR. JANSONIUS: Your Honor, my next witness is going to be Chris Lovato.

Can I have him take the stand?

MR. MALONEY: Mr. Lovato, take the stand, please. Raise you right hand.

CHRISTOPHER LOVATO

Having been first duly sworn according to law, upon his oath testified as follows:

[p. 379] MR. MALONEY: Be seated, give your name and address to the reporter.

THE WITNESS: Christopher Lovato, address is 4527 Downey, Northeast, Albuquerque.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Where do you work, Mr. Lovato?

A. ABF Truck Lines.

Q. What do you do there?

A. Operations supervisor.

Q. How long have you been an operations supervisor at ABF?

A. Six, seven years.

Q. Were you involved in the decision to quit using Michael Manso as a preferential casual last summer?

A. No.

Q. Do you recall when Mr. Manso started back to work in approximately late April or early May of 1989?

A. I remember him coming back to work. Yes.

Q. Did you tell Mr. Manso at that time that ABF was gunning for him?

A. No.

Q. Have you ever said anything like that to [p. 380] Mr. Manso?

A. No.

Q. Have you ever threatened Mr. Manso that he was going to be retaliated against in any fashion?

A. No.

MR. JANSONIUS: That's all, Your Honor.

MR. MALONEY: Cross examine.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Lovato, my name is Lewis Harris, I'm an attorney with the National Labor Relations Board, and I'd like to ask you a couple questions.

When Mr. Manso came back to work, you knew at that time that he had filed a grievance about his earlier termination, didn't you?

A. No, huh-uh. I don't get involved.

Q. You knew that he had filed an unfair labor practice charge with the –

A. No.

Q. You didn't know that.

Do you know why he had been off of work for a period from June of '88 until April of '89?

A. No.

Q. You had no idea why he was off?

A. Terminated. He was a casual.

EXCERPTS OF MICHAEL MANSO

* * *

[p. 88] MR. JANSONIUS: No further questions.

MR. MALONEY: Thank you, step down. Please be seated and give your name and address to the reporter.

MR. MANSO: My name is Michael Manso. I live at 720 Muriel, Northeast, 87123 is the zip code.

MICHAEL MANSO

having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Are you presently employed, Mr. Manso?

A. Yes, I am.

Q. What is that employment?

A. I am self-employed. I started my own business, a recycling business.

Q. When did you first start work with ABF?

A. It was in April of '87, or the midsummer of '87.

Q. What job were you hired for at ABF at that time?

A. I was hired as a dock worker, casual is what I understood my position to be.

Q. Who hired you?

* * *

[p. 108] sustain the objection.

Q. (BY MR. HARRIS) Just for the clarification of the record, Ralph is Ralph Johnson the union secretary-treasurer?

A. Right, he was the one giving us the information.

Q. Did you return to work at ABF after your discharge on June of 1988?

A. After the grievance was heard in Washington, I did.

Q. Do you remember when you returned to work?

A. It was in April or the beginning of summer of that year. Right after the grievance procedures were heard, they put us back to work – I mean, they put us on a preferential hiring list, that would have been April of that year.

Q. Now, when you returned to work, what job did you return to?

A. I returned to the same job I had before, was dock worker, casual.

Q. And after you returned to work, did you have any conversations with any of the dock supervisors about your return to work?

A. Yeah, they – I talked to several of them at different times.

[p. 109] Q. Did you have a conversation with Chris Lovato?

A. Yes, Chris Lovato. I had spoke with Chris.

Q. How long after you came back to work do you recall that?

A. It was, I'd say about, no shorter than a week, no longer than a week.

Q. Where did that conversation with Chris take place?

A. It was in my assigned trailer.

MR. MALONEY: In your what, sir?

THE WITNESS: My assigned trailer, they assign you to break, take the freight out and put in other freight.

Q. (BY MR. HARRIS) All right. And will you please relate what he said and you said, if anything?

MR. JANSONIUS: I object to hearsay again.

MR. MALONEY: What grounds?

MR. JANSONIUS: Hearsay.

MR. MALONEY: Is he a supervisor?

MR. HARRIS: Yes, he's a supervisor, alleged and admitted.

MR. MALONEY: Well, it's not hearsay.

[p. 110] MR. JANSONIUS: I repeat my objection in that there is no foundation laid, that anything Mr. Lovato did – had no authority over employment practices.

MR. MALONEY: Well, he is a supervisor. It may very well be – I don't know what he's going to say. It may show animus, could show policy, could show you a lot of things. Go ahead.

THE WITNESS: Chris Lovato said I had better watch my step, that ABF was gunning for me.

Q. (BY MR. HARRIS) What did you say, if anything?

A. I told him that I'll definitely do that.

Q. Do you recall a conversation with Tom McNutt after you returned to work?

A. Yes, I do.

Q. Approximately how long after you returned did that conversation take place?

A. It was just a few days after I had talked to Chris.

Q. Where did that conversation take place?

A. In and around my assigned trailer.

Q. Was anyone else present?

A. No.

Q. Would you relate, as best you can, what [p. 111] Mr. McNutt said and what you said, if anything?

A. Yes, Mr. McNutt had come up to me and told me that he personally didn't have nothing to do with me being terminated. But that what I did I had to do, and you won. But he noticed I had been coming to work with a pissed-off attitude, is the words he used, and then again stated that he had nothing to do with my termination.

I told him "Well, you know, okay." And I was listening to him, because he was coming in with this speech to me and he was concerned about my attitude.

He said, "What ABF did was wrong, but what you should do is try to come with a good attitude and work with me and things will be a lot easier for you and I around here."

MR. MALONEY: But you were on the preferential list at that time?

THE WITNESS: Yes, sir.

MR. MALONEY: Were you given any indication that you would be trained to receive truck driving qualifications?

THE WITNESS: Not from any – not from any supervisor, I didn't.

MR. MALONEY: All right. Go ahead, Mr. [p. 112] Harrison.

Q. (BY MR. HARRIS) Did he make any reference to higher echelon?

A. Yes.

MR. JANSONIUS: Objection. Now, we're talking hearsay on here.

MR. MALONEY: No, we're not. Overruled. Go ahead.

THE WITNESS: In the same conversation, Mr. McNutt also told me that I should watch to be – the way he said it was to be careful because the higher echelon was after me.

Q. (BY MR. HARRIS) Did you say anything to him about any of these remarks he made?

A. I told him, "Thank you for coming to me and talking to me on your feelings," and that was about it; that I would take his advice. There was another incident with another foreman.

Q. I'll get to that. And who was that other foreman?

A. It was Kyle Beeson.

Q. And when he spoke with you, how long was it after you had returned to work?

A. It was just shortly after – a day or two days. This all happened real fast because everybody [p. 113] was all surprised that we made it back on the dock.

Q. Where did you have this conversation with Mr. Beeson?

A. Right there in front of the assignment sheet where the foremen stand, righi there where – right there where they stand at.

Q. Was anyone else around?

A. Yes, there was other employees around.

Q. Do you know who they were?

A. I can't give you any names, but there other men there.

Q. What did Mr. Beeson say?

A. As I approached him walking up to the assignment sheet, he said, "Well, it looks like you made it back.

let's see how long it takes them to get rid of you this time."

Q. What did you say, if anything?

A. I just kind of looked at him and didn't really say much.

(General Counsel's Exhibit 3 marked.)

Q. I'm going to show you a document that I have marked General Counsel's Exhibit 3 and ask you to take a look at that, let me know if you have seen that document before.

A. Yes, I have.

* * *

[p. 116] months after.

MR. MALONEY: What month of what year was it?

THE WITNESS: It had to have been November, middle of November.

MR. MALONEY: Of what year?

THE WITNESS: 1988.

MR. MALONEY: Was it before you went back to work?

THE WITNESS: Yes, sir.

MR. MALONEY: Okay, go ahead.

Q. (BY MR. HARRIS) Were you home by your phone on May 6th when this call would have been made?

A. Yes, sir.

Q. Did you receive any call?

A. The phone didn't ring.

Q. Did you talk to anyone at ABF about this letter dated May 8th, any supervisor at ABF about a letter?

A. I had talked to a supervisor, I don't recall the supervisor's name, but I inquired as to who made the call. I wanted to know who called me and what was the letter all about.

Q. What did the supervisor tell you?

[p. 117] MR. JANSONIUS: Your Honor, I object on hearsay again, there is no – no identification, even of the supervisor.

MR. MALONEY: Who did you speak with – doesn't make it hearsay, though.

MR. JANSONIUS: Makes it impossible for me to cross-examine on something when I don't know who is being talked about.

MR. HARRIS: He says he doesn't know.

Q. (BY MR. HARRIS) If I may suggest, would it have been Ron Ford?

A. That is right. It was Ron Ford.

MR. JANSONIUS: I'll object to leading.

MR. MALONEY: Well, did you want to know who the supervisor was?

MR. JANSONIUS: Yes, but I didn't want general counsel telling him who it was.

MR. MALONEY: Well, now you know. What did you say to Ford? What did Ford say to you?

THE WITNESS: Ford told me that Jeff Motter had called to verify the call, that is a fellow Teamster and –

MR. MALONEY: What do you mean "verify the call"?

THE WITNESS: Well, see, that is the thing [p. 118] that ABF started doing, they would have a fellow Teamster verify whether or not ABF called you.

MR. MALONEY: Did he tell you which supervisor had placed the call?

THE WITNESS: Ron Ford is the supervisor.

MR. MALONEY: Did Ron Ford tell you which supervisor had called you?

THE WITNESS: Yeah, it was on his shift.

MR. MALONEY: Did he place the call?

THE WITNESS: Yes, he did. Well, it wasn't him that placed the call, he was present at the time that Jeff Motter –

MR. MALONEY: So he asked Motter to call you?

THE WITNESS: That's right.

MR. MALONEY: And Motter called you in his presence?

THE WITNESS: Right.

MR. MALONEY: And why did they do that?

THE WITNESS: To verify whether or not you are home by the phone.

MR. MALONEY: Was it a new procedure or old procedure?

THE WITNESS: To my understanding, it was a new procedure. I wasn't familiar with it.

[p. 119] MR. MALONEY: Go ahead.

THE WITNESS: And he told me that Motter was the one that verified the call.

MR. MALONEY: He verified the call? He made the call?

THE WITNESS: Yeah, he made the call.

MR. MALONEY: All right, let's go.

THE WITNESS: So after that I went and talked to Motter, I said, "Jeff, did you call my house? What number did you call?"

He said, "I called, but when I was dialing the number, I felt I had made a mistake in dialing your number."

I said, "Why didn't you dial it again?"

He said that Ron Ford wouldn't let him dial it again, and I've got that in a – I had him sign a statement to that effect. Because of the grievance procedures, I needed some proof of what was going on.

Q. (BY MR. HARRIS) Prior to this use of the fellow teamster to make the call – or to verify the call is the term, I guess, that is used over there – who had made the

calls when you worked there from April '87 to June of '88? Who called you to come into work?

* * *

[p. 125] MR. MALONEY: Did you attend the meeting?

THE WITNESS: I did not attend. I was there at that meeting, but I didn't stay for that particular item, they didn't address it. They had me there on another item of discharge and I stayed there and listened to that, and I was upset at the fact that they didn't put me back to work, so I just left. I wasn't real concerned with that money at that time, but I was there, in Arizona.

MR. HARRIS: Up until –

MR. MALONEY: Off the record.

(Off-the-record discussion.)

(Recess held.)

Q. (BY MR. HARRIS) Mr. Manso –

MR. MALONEY: Just a moment. This hearing will be in order. I remind you that you are still under oath.

Q. (BY MR. HARRIS) I'm going to direct your attention to August 11th, 1989. Were you late to work on that day?

A. Yes.

Q. How late were you?

A. Four minutes late.

Q. Did you receive a warning letter because of that lateness?

[p. 126] A. Yes, I did.

Q. I'll show you what is in evidence as Respondent's Exhibit 16. Is that the letter you received?

A. Yes, this is the letter.

Q. Did you speak with anyone at the company in supervision about that letter, that particular letter, after you received it?

A. No, I don't believe I did.

Q. Did you file a grievance on that particular letter after you received it?

A. No, because that was my first letter for being late and, like I stated, previous to that, the letters were not being grieved unless it is a termination or a suspension.

Q. Directing your attention to August 17th, 1989, were you again late on that date?

A. Yes, I was.

Q. Would you explain the circumstances surrounding –

A. I had –

Q. – your being late that day?

A. I was on my way to work in the morning for the 5:00 shift, and I had called ABF to tell them I was having car trouble and that I would be in late, [p. 127] but I would be in.

I talked to Joe Kennera, the supervisor on duty, and he said, "Okay, I'll make a note of it."

Q. Do you recall how soon before the shift that you called that you had the car trouble?

A. How soon before the shift I called to let them know I was going to be late?

Q. Yes.

A. I called 24 minutes after the hour of 5:00.

MR. MALONEY: AM? PM?

THE WITNESS: AM, 5:24 is when I called.

MR. MALONEY: What time were you due in – so you called 24 minutes late, is that right?

THE WITNESS: I called in 24 minutes late to let them know I would be late. I was having car trouble. I had called from a pay phone. When my car broke down, I walked to the nearest pay phone from the freeway.

I called from the phone and talked to ABF, and I spoke to Joe Kennera, and he said he would make a note of it. Then I called my wife, and my wife came and picked me up from the pay phone I was at.

MR. MALONEY: Where were you located?

[p. 128] THE WITNESS: The pay phone.

MR. MALONEY: Where in Albuquerque were you located?

THE WITNESS: Where do I live?

MR. MALONEY: Where were you located when you broke down?

THE WITNESS: I was at – in between the San Pedro and Carlisle exit.

MR. MALONEY: Of what?

THE WITNESS: I-40.

MR. MALONEY: Okay. Go ahead.

THE WITNESS: There is not an exit at San Pedro, it is the San Mateo exit. There is an exit at San Mateo and Carlisle, it was in between that stretch of San Mateo and Carlisle. I made a mistake, I broke down in between that stretch.

I got out of the car, hopped the fence and walked to the nearest pay phone on Carlisle. There is an Exxon station, it is an abandoned Exxon station, I used that pay phone to call ABF and my wife.

My wife then picks me up after she got up out of bed and dressed and all, came and picked me up – got back on the highway to go to ABF and that is when I got stopped by a police officer for [p. 129] speeding.

MR. MALONEY: Where is ABF located?

THE WITNESS: It is on I-25 north, on I-25 just by the Jefferson exit, I guess that is the best description I can give. Does anybody want to help me on that one?

MR. MALONEY: Go ahead.

THE WITNESS: After my wife came and I got in the car, and I said, "Let me drive," and got in and got on the highway, the officer pulled me over for speeding.

MR. MALONEY: What was wrong with your car?

THE WITNESS: It overheated on me. I had broke the heater core, and I had that heater core repaired, and then I did – the next couple days – the two days following my car breaking down, I had it repaired at a shop. The heater core got rusted out and all the water came out and the car overheated. It got so hot it stopped.

So the officer gave me a ticket for speeding, and I explained to the officer I was late for work and I needed to get there in a hurry.

He said, "I can understand. I've been late for work before myself."

[p. 130] He didn't issue me a citation, and he said, you know, "Just slow down."

So I said, "Okay."

He gave me his badge number and his name, so when I got to ABF, I told the foreman on duty which was – by that time Tom McNutt had arrived for his shift.

MR. MALONEY: What time did you get to ABF?

THE WITNESS: I believe I got there – it must have been, it was ten until 6:00.

MR. MALONEY: You were due at 5:00?

THE WITNESS: Yes, sir.

MR. MALONEY: Okay. Go ahead.

THE WITNESS: It was ten until 6:00 AM, and I punched in, and I went to get my assignment and Tom McNutt took me upstairs and started to write out a

corrective interview is that what they call it. It is a piece of paper that explains what you did and the action that was going to be taken against you for the violation of being late to work.

I told him that I'm not going to sign that piece of paper because that would be agreeing with what you are writing down on there, and I don't agree with what you are writing on there at all. [p. 131] You don't have it right, and we got into a little bit of an argument. I told him, "I'm not signing that piece of paper because it is an incorrect piece of paper."

He had on there the officer pulled me over for assistance. He did not pull me over for assistance. He did not pull me over for assistance, he pulled me over for speeding violation, and it was two separate vehicles – the vehicles.

MR. MALONEY: Had they already called the policeman?

THE WITNESS: Yeah, they got in touch with him.

MR. MALONEY: Before they got you in the office, they called this policeman?

THE WITNESS: No, sir. They immediately take you in when you punch in and then they take you up into the office and they start filling out this piece of paper.

And I had told them that I, also, was stopped by an officer, and I gave them the badge number and the name and that was furthermore why I was late.

MR. MALONEY: What I'm asking you is, by the time this gentlemen had called you into the [p. 132] office to write out this disciplinary warning, the company had already contacted this officer?

THE WITNESS: No, I don't think they – there was no way they could have done that because, you know, the time was just – I had just got there. There was no way they could have called the officer that fast, because I was standing right there and McNutt was there with the paper.

MR. MALONEY: How did he know about what this officer did?

THE WITNESS: I told him.

MR. MALONEY: You mean he put down what you told him incorrectly?

THE WITNESS: Yes, he did. I told him that – I said, "I'm not signing that piece of paper, it's not right."

He got a little bit aggressive with me, and he said, "You have to sign this paper."

And he got offensive – and he being offensive, I got offensive, and before you knew it, we were yelling at each other.

I told him that I wanted to talk to the shop steward. He said, "Fine, when Wally gets here, you talk to Wally. And then you're going to have to sign this paper." And I still didn't sign this [p. 133] paper to this day. That paper hasn't been signed.

Wally got there and got me and got the company together and we kind of talked there on that, and that is what happened as far as me being late that day.

Q. (BY MR. HARRIS) Later that day, were you called into the office for a meeting with Mike Long and Ed Fultz?

A. Yes, I was called into the office several times that day. They were having trouble trying to determine whether or not – what to do with me being late the second time, that's the impression I got, because they kept calling me in there and asking me questions and questions – they were interrogating me, as I call it.

I said, "What difference does it make why I was late, I was late. What is with all the questions for what reason I was late?"

They were saying that we are trying to check out your story. And that doesn't make any difference to me, I was late, I was late, what difference did it make.

Q. How many times were you called into the office there?

A. Three separate times during the shift.

[p. 134] MR. MALONEY: When your wife came to your assistance, what did she so? Did she come where you were broken down on Interstate 40?

THE WITNESS: No, because I would have had to walk a long ways to get to the car, where my car was, and I stayed there at the pay phone.

MR. MALONEY: Did she go to the pay phone?

THE WITNESS: Yes.

MR. MALONEY: What happened then?

THE WITNESS: I said, "Get out, I'm driving it. I got to get to work."

She got in the passenger side; I drove the car to work.

MR. MALONEY: So you just abandoned the other car?

THE WITNESS: Oh, yeah, I just left it on the side of the road. The officer didn't even see the other car. Yes, I just left it there.

MR. MALONEY: So you and your wife both went to work, she dropped you off –

THE WITNESS: Yes.

MR. MALONEY: – and went home?

THE WITNESS: And went home. She was in her pajamas. So that is what happened, why I was

* * *

[p. 152] speculation.

MR. MALONEY: What time did your wife get there, as best you can?

THE WITNESS: I really don't know what time she got there.

MR. MALONEY: Was she in the car when the policemen pulled you over?

THE WITNESS: Yes, sir.

Q. (BY MR. JANSONIUS) Just to get the sequence straight, it takes about 10 to 15 minutes to get from your house to the San Mateo exit, is that correct?

A. Yes, sir.

Q. And about 5:25 AM, you called your wife, she was at home, and you asked here to come pick you up at that Exxon station that you had walked to, is that correct?

A. Yes, sir.

Q. So if it would take her 10 or 15 minutes to get to that spot, the earliest she could have gotten there would be about 5:45 or 5:35 at the earliest?

A. I guess you could say that, if you like.

Q. Then from there, you got on the highway and started driving back towards the terminal, is [p. 153] that correct?

A. That's right.

Q. How long does it take to get from the Exxon station off the San Mateo exit on I-40 to ABF's terminal on I-25 at the Jefferson exit?

A. It should take about ten minutes. At the rate of speed I was traveling, it would have taken a lot less than that, from what the officer said.

Q. En route, you were pulled over by the officer, is that correct?

A. Yes, I was.

Q. How long did he detain you?

A. How long? Just very shortly, just to tell me to slow down, and he didn't give me a ticket.

Q. Then from there you got to the terminal, and you say you got to the terminal about 5:40, is that correct?

A. I believe I punched in about ten minutes to 6:00, that is what my time card said – no five until 6:00, ten until 6:00, something like that.

Q. You filed a grievance over that termination, isn't that right?

A. Yes. sir.

Q. And that went up to the Arizona-New Mexico Joint State Committee, is that correct?

[p. 154] A. Yes, sir.

Q. And it sustained your discharge, didn't it?

MR. HARRIS: Objection to this line of questioning. It is beyond the scope of direct.

MR. MALONEY: Overruled. We all know they sustained it, otherwise we wouldn't be here.

THE WITNESS: Yes, they did.

MR. HARRIS: I was objecting to the entire line regarding the grievance filed after his discharged.

MR. JANSONIUS: I'll pass the witness.

MR. HARRIS: No questions.

MR. MALONEY: Thank you very much. Step down.

(Witness excused.)

MR. MALONEY: Who is you next witness?

MR. HARRIS: Jeff Motter, M-o-t-t-e-r.

MR. MALONEY: Come forward, Mr. Motter. Please be seated and give your name and address to the reporter.

MR. MOTTER: Jeff Motter, M-o-t-t-e-r, 53 Bobolink Lane, Tijeras, it's New Mexico, 87059.

* * *

[p. 505] MR. MALONEY: Which one were you driving to work that broke down because it overheated?

THE WITNESS: My car.

MR. MALONEY: What kind of a vehicle is that?

THE WITNESS: It's a '72 Ranchero.

MR. MALONEY: And what kind of a car did she some and pick you up in?

THE WITNESS: She came and picked me up in a '78 Dasher, Volkswagen Dasher.

MR. MALONEY: When you were stopped by the police, what kind of a vehicle were you driving?

THE WITNESS: A '78 Volkswagen Dasher.

MR. MALONEY: And you were driving it even through it was her car?

THE WITNESS: Yes, sir.

MR. MALONEY: Where was she sitting?

THE WITNESS: In the passenger seat.

MR. MALONEY: How did you remove that '72 Ranchero from the freeway, or wherever it was that it was broken down?

THE WITNESS: I had my wife – I told my wife when she dropped me off from work to get my brother to get his truck to take my car home, pull the car home, so we could fix it.

EXCERPTS OF THOMAS MCNUTT

* * *

[p. 408] MR. MALONEY: All right. Bring them in.

MR. JANSONIUS: Your Honor, our next witness is Tom McNutt.

MR. MALONEY: Tom McNutt?

MR. JANSONIUS: Yes.

MR. MALONEY: All right. Come forward, please. Raise your right hand.

THOMAS C. MC NUTT

having been first duly sworn according to law, upon his oath testified as follows:

MR. MALONEY: Be seated, give your name and address to the reporter.

THE WITNESS: You want me to give my name and street address?

MR. MALONEY: Yes.

THE WITNESS: Me name is Thomas C. McNutt, Junior, my address is 1155 Chiquitos Road, Bosque Farms, New Mexico.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Where do you work, Mr. McNutt?

A. I work for ABF Freight System.

Q. And how long have you worked there?

[p. 409] A. I've worked for ABF since March of 1983.

Q. What's your job at ABF?

A. Operations supervisor.

MR. MALONEY: Is that the same as a foreman?

THE WITNESS: Yes, same as a foreman. That's our official title.

Q. (BY MR. JANSONIUS) How long have you been an operations specialist?

A. Since I was hired in 1983.

Q. So you worked on the dock in the spring and summer of 1989; is that correct?

A. I did.

MR. MALONEY: What is your basic job as operations supervisor? What do you do all day?

THE WITNESS: I am responsible for inbound and outbound freight, loading trailers, unloading trailers, calling crews, manning, that type of thing.

MR. MALONEY: Do you do any work yourself?

THE WITNESS: No, sir, I do not.

MR. MALONEY: So you oversee other people?

THE WITNESS: Yes, I do.

MR. MALONEY: Okay. Go ahead.

Q. (BY MR. JANSONIUS) Do you recall when Mr. Manso returned to work on the dock in late April or the [p. 410] beginning of May of 1989?

A. Yes, sir.

Q. Did you have any discussions with him at that time?

A. No. The only discussion I had with Mr. Manso was after he came back to work, I approached him, shook his hand, told him I was glad to see him back, that I did not have any involvement in anything that had gone on, and that I never had any problem with any work he had ever done, and I expected us to have a good working relationship from that point on.

Q. At any time did you tell Mr. Manso that the higher echelon of ABF was after him?

A. No, sir.

Q. Did you ever tell him that ABF-was out to get him?

A. No, sir, I did not.

Q. Did you ever threaten any kind of retaliation against Mr. Manso for any of his activities?

A. No, sir.

MR. JANSONIUS: No further questions.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. McNutt, my name is Lewis Harris, I'm an attorney with the National Labor Relations Board, and

* * *

EXCERPTS OF JEFF MOTTER

* * *

JEFF MOTTER

[p. 155] having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Mr. Motter, are you appearing here under subpoena that I issued to you or had issued to you?

A. Yes, I am.

Q. Are you presently employed by ABF?

A. Yes, I am.

Q. How long have you been employed by ABF?

A. About four years full-time, six years altogether.

Q. What is your job with ABF now?

A. Dock man, checker.

Q. How long have you had that job?

A. Four years, about.

Q. Is that considered a regular position?

A. Yes, it is.

Q. Do you recall the procedure for calling casuals having been changed sometime during 1989?

A. Yeah, you might say it changed.

Q. What is your view of how it changed?

A. Well, when I was a casual, they'd call you

* * *

[p. 159] Q. (BY MR. HARRIS) Directing your attention to that date, June 19th, when you did call Mr. Manso, would you explain what happened that day and what conversation you had with the supervisor who was there at the time you made the call?

A. Yes, I was working a midnight shift, I believe, and we were probably calling him for 8:30, which would have made it between 5:30 and 6:30 in the morning, so it was probably around 6:00 in the morning.

So at that time, I probably had been up for 22, 23 hours without any sleep. And, normally, when we call teamsters – if a supervisor calls a teamster, a regular full-time employee, and he's unable to get ahold of him, he has an hour to answer up, then towards the end of that hour he'll get a teamster to verify that he has tried to call him and he is not home. And normal procedure is you'll go in and call a couple times and try to get through to him; then you sign a statement that you did, in fact, try to get ahold of him.

Then if there's a question, the Teamster can come to you and say, "How come you couldn't get ahold of me." I'm not sure if this was the first time I had called a preferential casual, or the

* * *

[p. 160] first time I hadn't got ahold of one.

I wasn't even careful about how I was calling, because you call two or three times. And this time I dialed Mike, and very likely, I misdialed the number. And the supervisor that was there wouldn't let me redial, but I wasn't – and I told him at that time that it wasn't right. In fact, I'm sure I dialed the wrong number.

Q. Who was the supervisor?

A. Ron Ford.

Q. Have you had a tardy record at the company at all?

A. Not any worse than anybody else that works under the conditions that I work under.

MR. MALONEY: That doesn't tell me a thing.

Q. What kind of tardy –

A. First of all, I have to tell you, a 15 percenter, what I do most of the time, I can be on call 24 hours a day, seven days a week, and you can even work two shifts a day.

They can call you in at 2:30 in the morning, have you come in at 5:00, working until 1:30 in the afternoon, and call you back at midnight, without any sleep, and work you until 8:30

EXCERPTS OF DEPUTY SHERIFF SMITH

* * *

[p. 509] Let's take about a five-minute recess.

(Proceedings in recess.)

MR. MALONEY: On the record.

Call your next witness.

MR. JANSONIUS: Your Honor, I call Officer Derryl Smith. He's on his way in.

MR. MALONEY: Mr. Smith.

MR. JANSONIUS: Officer Smith, if you would take the stand up here, please.

MR. MALONEY: Raise your right hand, sir.

DERRYL SMITH having been first duly sworn according to law, upon his oath testified as follows:

MR. MALONEY: Would be seated, give your name and address to the reporter.

THE WITNESS: Derryl Smith, at 400 Roma, Northwest.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Officer Smith, who do you work for?

A. Bernalillo County Sheriff's Department.

Q. What do you do there?

A. Deputy sheriff.

[p. 510] Q. How long have you been with the Bernalillo County Sheriff's Department?

A. Going on eight years.

Q. What are your responsibilities as a deputy sheriff?

A. Enforce traffic laws, protect property, ensure the safety of the citizens.

Q. How long have you worked for the sheriff's department?

A. Eight years.

Q. Officer Smith, I'd like to show you a document that has been offered as Respondent's Exhibit 18 and ask if you would look at that and state whether you can identify that?

A. Yes. That's my statement.

Q. Is that your signature at the bottom there?

A. Yes.

Q. And when you prepared this statement, were the events described in it fresh in your mind?

A. Yes.

Q. Do you recall the incident that's discussed in this report?

A. Yes.

Q. Would you describe the incident that is discussed in Exhibit 18?

[p. 511] A. It was approximately 5:30, 5:40 in the morning. I was en route to the academy.

MR. MALONEY: You mean the police academy?

THE WITNESS: Yes, sir, the police academy. I was a drill instructor there at the time.

He was – we were westbound on I-40, and I observed a vehicle traveling at a high rate of speed. I fell in behind the vehicle and paced him for approximately two miles, three miles, at speeds of eighty-five to ninety miles an hour. I then engaged my emergency equipment and pulled him over.

MR. MALONEY: You mean your siren?

THE WITNESS: Just the red lights. At 5:30 in the morning I'll wake up the people here.

And he pulled over. I approached the vehicle, asked for his driver's license. The individual gave me his driver's license. We were in the transition of the old New Mexico citations and the new ones, and I did not have new citations on me, so I gave him a verbal warning to slow it down.

Q. (BY MR. JANSONIUS) Who is him that you're referring to?

A. Mr. Metto, whatever his name is. I can't –

MR. JANSONIUS: Your Honor, may the record [p. 512] reflect that –

MR. HARRIS: Wait a minute. I don't want –

MR. MALONEY: Is the man in the room here?

THE WITNESS: Yes.

MR. MALONEY: Where is he?

THE WITNESS: That's him right here.

MR. MALONEY: All right. I'll let the record reflect he's pointed to Mr. Manso.

Q. (BY MR. JANSONIUS) Was Mr. Manso by himself on that occasion?

A. Yes, he was.

Q. Did he have any car trouble that you observed?

A. No.

Q. Did he tell you he had car trouble?

A. No.

MR. JANSONIUS: No further questions.

MR. MALONEY: What kind of a vehicle was he driving?

THE WITNESS: If I can remember, it was just passing, it was an – it wasn't a large car. It was a compact vehicle.

MR. MALONEY: Do you know the make or model?

[p. 513] THE WITNESS: No. I didn't even notice that.

MR. MALONEY: You say he was alone?

THE WITNESS: Yes, he was.

MR. MALONEY: There was no woman in the car with him?

THE WITNESS: No, there was not. He was by himself.

MR. MALONEY: Did he give you an excuse for why he was driving so fast?

THE WITNESS: He said he was late for work. That's the only excuse.

MR. MALONEY: All right. Go ahead. Cross examine.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Would you step off the stand, please, and identify Mr. Manso, Officer Smith?

A. I am – it's been quite a while, but this is the gentleman right here.

MR. HARRIS: The gentleman with the dark hair, would you stand up, please?

THE WITNESS: No, no. The one next to him, I believe.

Q. (BY MR. JANSONIUS) The one next to him?

[p. 514] A. Yes.

Q. Okay. That's the one you believe is Mr. Manso?

A. Yes. It's been quite a while.

Q. All right.

A. Can I get back on the stand now?

MR. MALONEY: Yes, go ahead. Please sit down, Officer.

Q. (BY MR. HARRIS) Could the car have been something like a VW Dasher?

A. Yes.

MR. HARRIS: No other questions.

MR. JANSONIUS: Your Honor, I would offer Respondent's Exhibit 18 into evidence.

MR. HARRIS: No objection, Your Honor.

MR. MALONEY: Sustained. There's no reason to offer that. You have his testimony here.

MR. JANSONIUS: Thank you, Officer.

THE WITNESS: Am I excused now?

MR. MALONEY: Anybody wish the officer to remain?

Okay. Step down.

THE WITNESS: Thank you.

MR. JANSONIUS: Your Honor, that is respondent's final witness.

NLRB SECTION 10(b), 29 U.S.C. § 160(b) (1988)

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of

evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

No. 92-1550

In The

Supreme Court of the United States

October Term, 1993

ABF FREIGHT SYSTEM, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does an employee forfeit the remedy of reinstatement with backpay when an Administrative Law Judge finds that he purposefully testified falsely during the administrative hearing?

PARTIES TO THE PROCEEDING

(Rule 29.1 Statement)

AFB Freight System, Inc. is a wholly owned subsidiary of Arkansas Best Corporation. ABF Freight System, Inc. has one subsidiary by the name of ABF Freight System (BC), Ltd. Respondent is the National Labor Relations Board, an agency of the United States government. Michael Manso is an individual who ABF Freight System, Inc. has been ordered to reinstate to employment in Albuquerque, New Mexico.

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MISCELLANEOUS

No. 92-1550

In The

Supreme Court of the United States

October Term, 1993

ABF FREIGHT SYSTEM, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit has been reported at 982 F.2d 441 (10th Cir. 1992) and is included at Pet. for Cert., App. A-1.[1]

The Decision and Order of the National Labor Relations Board and the Administrative Law Judge's Decision

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[1] The Appendix to the Petition for Writ of Certiorari is cited as "Pet. for Cert., App. ___." The Joint Appendix filed with this Brief on the Merits is cited as "J.A. ___."

have been reported at 304 NLRB No. 75 (1991) and are included at Pet. for Cert., App. B-1.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988). The judgment of the Court of Appeals was entered on December 29, 1992 (Pet. for Cert., App. A-1).

The Court of Appeals for the Tenth Circuit had jurisdiction over the National Labor Relations Board's Final Order pursuant to 29 U.S.C. § 160(e) (1988).

STATUTES INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1988), provides:

> Whenever it is charged that any person has engaged or is engaging in any such unfair labor practice, the Board . . . shall have the power to issue and caused to be served upon such person a complaint stating the charges . . . and containing a notice of hearing. . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts in the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

Section 10(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(c) (1988), provides:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

The text of all statutory provisions referred to in this Brief are included at Pet. for Cert., App. C-1.

STATEMENT OF THE CASE

At issue in this appeal is the integrity of the NLRA and its adjudicatory system. Can an employee who lies to his employer and then repeats his lie to an administrative law judge, during a formal NLRB proceeding, be reinstated to his job and awarded backpay? A majority of circuits that have addressed this issue have said "no." With virtually no discussion of the contrary authority or rationale for its decision, however, the Tenth Circuit condoned perjured testimony by the charging party in this case and rewarded him with backpay and reinstatement.

ABF Freight System, Inc. ("ABF") is an interstate trucking company with freight terminals in several cities, including Albuquerque, New Mexico. Dock workers at the Albuquerque terminal are represented by Local 492 of the International Brotherhood of Teamsters, Warehousemen & Helpers of America ("Local 492"). Wages, hours, terms and conditions of employment for ABF's dock workers in Albuquerque are set out in national and regional labor contracts respectively known as the

National Master Freight Agreement ("NMFA") and Western States Area Supplemental Agreement ("WSA").

Michael Manso was hired as a casual dock worker at the Albuquerque terminal in April 1987. As an ABF employee, Mr. Manso was represented by Local 492 and was covered by the NMFA and WSA. Article 46, section 1 of the WSA provides that covered employees can only be terminated with "just cause." One warning notice for an offense is required before termination may be imposed, except for certain serious offenses, such as dishonesty, which can result in immediate discharge.

The specific events material to this appeal began in the Spring of 1989. On June 19 of that year, Mr. Manso was discharged from employment after two incidents of failure to protect start time. For a casual like Mr. Manso, failure to protect start time means he was unavailable for work at a time when he was subject to being called by ABF.

Mr. Manso grieved his June 19 termination and explained at the hearing, for the first time, that his telephone was not working. The Arizona-New Mexico Joint State Committee commuted Mr. Manso's discharge to a suspension without pay. Mr. Manso was reinstated to the casual list within a week after his June discharge.

Not long after completing his suspension, Manso was late for work on two occasions. The first incident was on August 11, 1989 and he was given a warning letter for tardiness. The second incident was on August 17, 1989 and this time he was discharged.

As an excuse for his tardiness on August 17, 1989, Mr. Manso told his supervisor, Ed Fultz and Branch Manager Mike Long that his car broke down on the freeway. He volunteered that he was assisted by Officer Smith of the Bernalillo County Sheriff's Department. (J.A. 73). When pressed for specifics, however, Mr. Manso became evasive and said he did not want to explain why he was late. At the suggestion of Local 492 Shop Steward Walter Maesta, Ed Fultz and Mike Long checked out Mr. Manso's story with the Bernalillo County Sheriff's Department. After doing that, they concluded that Mr. Manso's explanation was not legitimate and that his tardiness was not excused. Mr. Manso was discharged on August 21, 1989.

Through Local 492, Mr. Manso again lodged a grievance and again a hearing was held before the Arizona-New Mexico Joint State Committee ("JSC"). The JSC is comprised of an equal number of representatives of labor and management – none of whom can be affiliated with the company or local union involved in the dispute. This time the JSC concluded that just cause existed for the termination of Mr. Manso and denied his grievance. Under WSA Article 45, § 1(a), the JSC's decision was final and binding.

After losing his grievance, Mr. Manso filed an unfair labor practice charge with Region 28 of the National Labor Relations Board. He alleged that he was discharged in violation of NLRA §§ 8(a)(3) and (4). 29 U.S.C. § 158(a)(3) and (4) (1988) because he previously had filed an unfair labor practice charge and provided testimony to Region 28 of the Board. The unfair labor practice charge challenging Mr. Manso's August 1989 discharge was the

subject of a hearing before Administrative Law Judge Walter J. Maloney the week of January 8, 1990.

At the hearing, Mr. Manso testified under oath. He repeated the story about his car breaking down while on his way to work on August 17, 1989. (J.A. 104-107). He testified that his wife came to pick him up. (J.A. 105 & 106). Adding a new twist to the story he originally told Ed Fultz and Mike Long, Mr. Manso testified that Officer Smith of the Bernalillo County Sheriff's Department had pulled him over for speeding, that his wife was with him at that time. (J.A. 106, 111-115). To Mr. Manso's and Counsel for the General Counsel's visible surprise, however, Officer Smith appeared and testified at the hearing. (J.A. 123-128). In flat refutation of Mr. Manso, Officer Smith testified that he distinctly recalled Manso was alone when he stopped him for speeding the morning of August 17 at a time long after Manso should already have been at work. Manso told Officer Smith that he was speeding because he was late for work. Manso never mentioned any car trouble and Officer Smith did not witness any car trouble. (J.A. 124-127).

Given Officer Smith's testimony, the Administrative Law Judge recognized the implausibility and direct contradiction of Mr. Manso's testimony. As to Manso's excuse for being late for work the day he was fired, Judge Maloney specifically found that:

"Manso was lying."

(Pet. for Cert., App. B-59). The finding that Manso purposefully testified untruthfully was neither rejected nor questioned by the Board or Tenth Circuit.

In its decision, the Tenth Circuit affirmed the Board's award of reinstatement and backpay to Manso, holding that the Board did not abuse its discretion in concluding that Manso's misconduct was not sufficiently egregious to require the denial of reinstatement. (Pet. for Cert., App. A-19). No meaningful explanation was given by the Tenth Circuit for taking opposite sides with the other courts of appeal that have declined to enforce NLRB orders benefiting individuals who deliberately gave false testimony. This Court granted certiorari to resolve the clear conflict between the Tenth Circuit and the Seventh, Eighth, and Ninth Circuits. (J.A. 35).

SUMMARY OF ARGUMENT

Some propositions carry such common sense as to defy argument. One such proposition is that individuals who stand to gain financially from formal proceedings under law should not benefit from serious abuse of those proceedings. In unfair labor practices under the NLRA, a majority of circuits faced with the anomaly of a prevailing charging party who gave deliberately false testimony have accepted this proposition with little discussion.

The Tenth Circuit in this case decided that the integrity of Board hearings is not that important. Under the tacit rationale that the end justifies the means, the Tenth Circuit enforced an order of reinstatement of a charging party despite an unchallenged finding that he "was lying" in his sworn testimony to the Administrative Law Judge.

The Tenth Circuit's decision is wrong not just because it defies common sense – it defies sound public policy, it defies precedent, and it defies the National Labor Relations Act. First, the Act requires that witnesses in Board hearings swear under oath to tell the truth. When Mr. Manso lied to Judge Maloney, he was violating the Act.

Second, federal labor policy as embodied in the NLRA does not require that charging parties or discriminatees be awarded backpay and reinstatement just because an unfair labor practice has been found. In the false testimony context, the circuit courts have made that point clear. In cases involving post-termination misconduct by the charging party, the NLRB and circuit courts have also denied make-whole relief. The purpose of the Act is to protect the rights of employees to organize for purposes of collective bargaining and to minimize disruptions of interstate commerce, not to see that individuals are compensated for violations of the Act.

Third, the Board has broad powers to protect interstate commerce and to deter violations of the Act without turning a blind eye to manipulative abuse of process by charging parties. Cease and desist orders, notice posting, visitorial clauses, sanctions for repeat offenders, and contempt orders are significant tools available to the Board to command respect for the Act. Awards of backpay are commonly of little financial significance to corporate respondents, but when those awards are made to individuals who seriously abuse NLRB processes, the Board engenders disrespect and undermines the Act.

Fourth, loss of remedies by unfair tactics is nothing new. At common law and under the Federal Rules of

Civil Procedure, nefarious choices by individuals seeking to enforce rights can result in loss of remedies. Our system of justice necessarily requires that participants play by the rules. Allowing those who deliberately break the rules for the end of financial gain to realize a benefit from their illicit means is abhorrent to the administration of justice.

ARGUMENT

I.

AWARDING BACKPAY AND REINSTATEMENT TO CHARGING PARTIES WHO LIE DURING TESTIMONY IN AN UNFAIR LABOR PRACTICE CASE IS INCONSISTENT WITH ENFORCEMENT OF THE NLRA

Enforcement of the NLRA is an important public interest. No statute or policy exists in isolation, however, and years of adjudication under the NLRA provides a striking example of the federal courts and the Board's challenge to reconcile federal labor policy with other sometimes conflicting or overriding interests. In this case, there is a seeming conflict between the Board's preference for make whole relief in unfair labor practice cases and the statutory obligation and public policy that witnesses be sworn to tell the truth. On closer examination, the conflict is illusory and enforcement of the NLRA is not frustrated by denying backpay and reinstatement to individuals who seek to gain those remedies by giving false testimony.

A. The NLRA Itself Requires That Witnesses Bind Themselves To Tell The Truth.

The Board is a quasi-adjudicative body with an elaborate system for conducting evidentiary hearings, making findings of fact, and applying the facts to law under the NLRA. To safeguard the fact finding process, Congress directed that unfair labor practice proceedings:

> shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.

NLRA § 10(b), 29 U.S.C. § 160(b) (1973).[2]

Rule 603 of the Federal Rules of Evidence requires every testifying witness "to declare that the witness will testify truthfully. . . . " There are no circumstances where it is "impracticable" to apply Rule 603 in unfair labor practice proceedings or to otherwise excuse a witness from having to tell the truth. Expressly and by practice, the obligation to tell the truth in unfair labor practice hearings is required by the Act and disregard of that obligation violates the statute.

Consistent with Rule 603 and Section 10(b), Administrative Law Judges administer the following oath to each witness participating in an NLRB hearing:

> Do you solemnly swear that the testimony which you will give in this proceeding will be

[2] Unfair labor practice hearings are conducted by Administrative Law Judges. After an unfair labor practice hearing, an Administrative Law Judge renders an initial recommended decision to the Board. *See* Section 4(a), 29 U.S.C. § 154(a) (1973).

> the truth, the whole truth and nothing but the truth, so help you God?

See National Labor Relations Board Manual Division of Judges, 17008. The oath is administered to witnesses on an individual basis and in a manner that impresses upon them the importance and solemnity of their promise to tell the truth. NLRB Manual Division of Judges 17008.2. Canon 36, Judicial Ethics. At the hearing in Albuquerque, Michael Manso was administered the oath and bound himself to testify to "nothing but the truth."[3]

Toward the goal of reaching the truth, courts have criticized the Board's reticence to apply the Federal Rules of Evidence. In *NLRB v. Stark*, 525 F.2d 422 (2d Cir. 1975), *cert. denied*, 424 U.S. 967 (1976), for example, the Second Circuit condemned a long-standing Board policy against sequestering alleged discriminatees who are witnesses in an unfair labor practice proceeding. The court explained that administrative law judges needed to have discretion to invoke F.R.E. 615 to assure a fair hearing. *Id.* at 428-30. In response to criticism from the courts, the Board eventually changed its policy on sequestration of witnesses. *See Unga Printing Corp.*, 237 NLRB 1306 (1978).[4]

[3] For a discussion concerning the historical background of the witness oath, *see generally* Comment, *A Reconsideration of the Sworn Testimony Requirement*, 75 Mich. L. Rev. 1681 (1977).

[4] *See also General Engineering, Inc. v. NLRB*, 341 F.2d 367, 374-375 (9th Cir. 1965) (NLRB wrongfully revoked subpoenas directed to Board employees where no recognized privilege was claimed); *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517 (6th Cir. 1987) (restriction of employer's cross-examination of former employee regarding interim earnings wrongfully denied employer fair hearing regarding amount of backpay owed).

Plainly, the obligation that witnesses tell the truth in unfair labor practice proceedings is embedded in the NLRA and use of available safeguards against false testimony are important to federal labor policy.

B. Nothing In The NLRA Requires Award Of Backpay And Reinstatement In Every Case.

The purpose of the NLRA is to protect interstate commerce by securing the right of employees to organize, to bargain collectively through representatives of their own choosing, and to engage in other protected concerted activities. *NLRB v. Penn. G. Lines*, 303 U.S. 261 (1938); NLRA §§ 1 and 7, 29 U.S.C.A. §§ 151 and 157 (West 1973 & Supp. 1993). Unfair labor practice proceedings are intended to serve public policy, not the interests of charging parties or alleged discriminatees. *See NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418 (1968). *See also International Union, UAW-CIO v. Russell*, 356 U.S. 634, 643 (1958); *Virginia Elec. and Power Company v. NLRB*, 319 U.S. 533, 543 (1943). No language in the Act or its legislative history indicates that Congress considered the pecuniary interests of charging parties and alleged discriminatees superior to preserving the integrity of the witness oath in adjudicatory proceedings.

Although the NLRB may award reinstatement with backpay in unfair labor practice cases, that remedy is not "mechanically compelled by the Act." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941). Authority to order affirmative relief under section 10(c) is incidental to the primary purpose of curtailing unfair labor practices.

Once again, the Board's predilection is uncompelled by language in the NLRA. *Shepard v. NLRB*, 459 U.S. 344 (1983); *United Constr. Workers v. Laburnum Corp.*, 347 U.S. 656, 666-67 (1954).[5]

Significantly, reinstatement under section 10(c) is an equitable remedy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). "Equitable remedies are a special blend of what is necessary, what is fair and what is workable." *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 777 n.39 (1976), quoting *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).[6] To repeat a maxim, "a man must come into a court of equity with clean hands," Eyre, C.B., *Dering v. Earl of Winchelsea*, 1 Cox Eq. 318, 319 (1787).

While reinstatement is generally appropriate when an employee has been discharged in violation of the NLRA, it is inappropriate when an employee demeans Board processes to obtain that remedy. In that situation, the remedy of reinstatement must be subordinated to another equity – maintaining the integrity of the oath. To say otherwise is to embrace in adjudicatory proceedings the philosophy that the end justifies the means.

Federal appellate courts confronted with the issue have concluded, at least tacitly, that the end does not

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[5] Section 10(c) authorizes the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [chapter]." 29 U.S.C. § 160(c) (1988).

[6] In *Franks*, the court indicated that the circumstances when make-whole relief is available under the NLRA are narrower than the circumstances when such relief is available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 424 U.S. at 767 n.29.

justify the means. With their equitable and supervisory powers over the Board,[7] the courts have directed the Board to consider three factors when evaluating the propriety of make-whole relief: (1) the degree and kind of unlawful conduct committed by the employer and the employee, (2) the relationship between the conduct of both, and (3) the probable impact of selecting a particular remedy. *Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 840 (9th Cir. 1981); *NLRB v. Thayer Co.*, 213 F.2d 748, 755 (1st Cir. 1954), *cert. denied*, 348 U.S. 883 (1954). A balance must be struck between the severity of the unfair labor practice and an employee's misconduct.

Applying the above factors to the instant case mandates denial of make whole relief to Manso. First, ABF's decision to discharge Manso under its tardiness policy, even if considered unlawful under the NLRA, pales in comparison to Manso's decision to give false testimony. The conduct with which ABF has been charged was permissible until relatively recently in American history and is not a crime; Manso's conduct at the unfair labor practice hearing, by contrast, has been prohibited since early days of the common law and is a felony.[8]

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[7] *NLRB v. Greensboro News*, 843 F.2d 795, 798 (5th Cir. 1988); *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1095 (7th Cir. 1984).

[8] The federal perjury statute is codified at 18 U.S.C. § 1621 (1988). There are six elements to perjury: (1) an oral statement; (2) that is false; (3) made under oath; (4) with knowledge of its falsity; (5) in a legal proceeding or by affidavit; and (6) to a material matter. *See United States v. Debrow*, 346 U.S. 374 (1953). *See generally*, 4 W. Blackstone, Commentaries 136-37. Each of these elements is satisfied by Judge Maloney's findings regarding Manso's testimony at the hearing in Albuquerque.

Second, there is no causal relationship between ABF's conduct and Manso's conduct. There would not have been an unfair labor practice hearing but for the charge against ABF, but ABF did not compel Manso to commit perjury. To lie was his decision. Only the most fervent predeterminist could argue otherwise.

Third, the implication of reinstating a perjuror and awarding backpay is demoralizing. As Chief Justice Burger explained in *United States v. Mandujane*, 425 U.S. 564 (1976):

> Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative.

Id. at 576.

One need only imagine the thoughts of Michael Manso's co-charging party (Mr. Andrew Trujillo) and the alleged discriminatees in the companion case who attended the hearing in Albuquerque, who did not commit perjury, who witnessed Manso wrap himself in a conspicuous lie – and who ironically lost their cases. To them and to others, the implication is plain – perjury pays. The end justifies the means.

C. Making Charging Parties Suffer The Consequences Of Deliberately Giving False Testimony Will Not Undermine The NLRB's Authority To Enforce The Act.

Circumstances abound in which backpay, reinstatement, and other forms of make-whole relief have been denied by the courts despite a finding that an unfair labor

practice was committed. To avoid harmful consequences from an award of reinstatement and backpay to charging parties guilty of misconduct. dishonesty, or false testimony at an ULP hearing, several circuits have refused to enforce NLRB orders granting make whole relief.

The common thread running between the decisions denying reinstatement and backpay is that the policies of the Act are not satisfied by rewarding wrongdoing. Most recently, in *Precision Window Manufacturing v. NLRB*, 963 F.2d 1105 (8th Cir. 1992), the Eighth Circuit held that an employee who was discharged in violation of Section 8(a)(3) for engaging in protected union activity forfeited his right to reinstatement by making false statements under oath about his union activity during an unfair labor practice proceeding. In so holding, the Eighth Circuit pointedly stated:

> this court refuses to take the Board's processes as lightly as the Board apparently does. . . . The purposes and policies of the Act do not justify full reinstatement of an employee whose untruthful testimony abused the process he now claims should grant him full relief.

Id. at 1110, *citing Iowa Beef Packers v. NLRB*, 331 F.2d 176, 185 (8th Cir. 1964) (reinstatement and backpay denied to an employee where he had given false testimony at a NLRB hearing). This rationale underlies other circuit court decisions refusing to enforce NLRB orders of

backpay and reinstatement to charging parties who abused the system.[9]

Consistent with the majority view among circuits that have considered the Board's practice of elevating its preference for make-whole relief above honesty in sworn testimony, the circuit courts have consistently declined to enforce orders of reinstatement to employees guilty of unlawful or offensive conduct. To do so "would bid ill for all concerned," and renewing the employment relationship would not further the policies of the Act. *NLRB v. Apico Inns of Cal., Inc.*, 512 F.2d 1171, 1175-76 (9th Cir. 1975) is a good example. There, the Ninth Circuit refused to enforce an order of reinstatement to an employee who regularly insulted a manager in front of customers and engaged in other "reprehensible" conduct. In *NLRB v.*

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[9] *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964) (employee's misconduct exemplified by his pattern of falsification and deceit during his employment, climaxed by his false testimony at the hearing, disqualified him from reinstatement or other employment rights). *See also NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975) (employee who was discharged in violation of Section 8(a)(3), but who admitted lying during a Board hearing concerning the time reported on his time card, was denied reinstatement). Likewise, the Seventh Circuit declined ordering reinstatement because an employee fraudulently used an assumed name to collect unemployment while working for an employer. *NLRB v. Mutual Maintenance Service Co., Inc.*, 632 F.2d 33 (7th Cir. 1980). *See also Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380 (8th Cir. 1980) (full reinstatement denied because of an employee's dishonesty in failing to report earnings while collecting unemployment compensation benefits).

The same conclusion has been reached in labor arbitration cases. *See Aristocrat Travel Products, Inc.*, 52 Lab. Arb. Cases (BNA) 314 (1963).

Commonwealth Foods, Inc., 506 F.2d 1065, 1068 (4th Cir. 1974), the Fourth Circuit refused to reinstate employees where there was substantial evidence that they were engaging in theft. Even the Tenth Circuit held, in *NLRB v. Breitling*, 378 F.2d 663 (10th Cir. 1967), that a charging party who confessed to stealing property should not be given make-whole relief despite a finding that he was discharged in violation of Section 8(a)(1) & (3) of the Act. *Id.* at 665. *See also NLRB v. Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966) (same).[10]

Although many employment relationships are unfriendly or even adversarial, employers must be able to trust their employees. When there is a lack of trust, management is circumspect about delegating responsibility and efficiency is lost by over-supervision and scrutiny. This reality is appreciated by members of the labor and management bargaining committees who negotiated the National Master Freight Agreement and Western States Area Supplemental Agreement – ABF's labor contracts. Accordingly, they have agreed for years that employee dishonesty is grounds for immediate discharge.[11]

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[10] Employees who have threatened other employees have also been denied reinstatement because such a remedy would not effectuate the policies of the NLRA. *See NLRB v. R.C. Can Co.*, 340 F.2d 433 (5th Cir. 1965) (court refused reinstatement where employee threatened president of employer with bodily harm); *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972) (employee denied reinstatement for threatening supervisor with physical harm).

[11] Although the Board found that Manso was not terminated for dishonesty, in apparent disagreement with the ALJ, section 46 of the Western States Supplemental Agreement (ABF's bargaining agreement) provides for immediate discharge if an employee is dishonest. (J.A. 37). Contrary to the purposes of the Act, forcing ABF to compensate and maintain an employment relationship with someone as undeserving as Mr. Manso is in effect a penalty. The Act does not prescribe penalties in vindication of public rights. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941).

This common sense understanding that honesty and trust are core values in a civil society permeates the line of circuit court cases declining to enforce NLRB rewards to liars and tortfeasors. Also implicit in the rationale of these cases is the realization that public trust in government agencies is eroded when those agencies work for the advantage of individuals who abuse the system. In the present context, forcing employers to rehire charging parties who have committed character suicide will do little to deter unfair labor practices or maintain industrial peace, but will do a lot to portray the NLRB as a result oriented agency unconcerned with the integrity of its processes.

D. The NLRB Has Significant Powers To Enforce The Act And Deter Future Violations Without Rewarding Perjury.

The Board will not and has not been hand-tied in its ability to enforce federal labor policy by case law refusing to enforce its awards of make-whole relief to charging parties and discriminatees guilty of misconduct or false testimony. Reinstatement with backpay is only one of

many remedies the NLRB may impose. Violations of section 8 of the Act can be adequately deterred without enriching witnesses who abuse NLRA procedures in hopes of personal gain.

Traditional and effective measures taken by the Board upon a finding that section 8(a) has been violated include: cease and desist orders, notice posting orders, expungent orders and visitorial clauses. The Board can move beyond traditional orders and take more strident measures to deal with repeat violators of the Act. The goals are to protect concerted activity and avoid disruptions of commerce, and the Board has adequate tools to do that without its knee jerk resort to backpay and reinstatement.

When an employer has committed violations of sections 8(a)(1), 8(a)(3) or 8(a)(4), the Board will issue a cease and desist order. The order will proscribe the unlawful conduct in the specific case and require the employer to cease and desist from violating the Act "in any like or related manner." The order is usually confined to the particular geographic location involved. *See, e.g., Hickmott Foods,* 242 NLRB 1357 (1979); *J.P. Stevens and Company,* 240 NLRB 33 (1979), *enforced,* 612 F.2d 881 (4th Cir.), *cert. denied,* 449 U.S. 918 (1980); *Chase National Bank,* 65 NLRB 827, 829 (1946); *Laidlaw Corp.,* 171 NLRB 1366 (1968), *enforced,* 414 F.2d 99 (7th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970).

Cease and desist orders not only impose a continuing prohibition on future NLRA violations, but also subject an employer to contempt sanctions for violating the order. *NLRB v. C.E. Wylie Constr. Co.,* 934 F.2d 234 (9th Cir.

1991). If an employer does not cease or resumes an unfair labor practice, the Board is entitled to an enforcement decree from the appropriate Court of Appeals. *See, e.g., NLRB v. Mexia Textile Mills, Inc.,* 339 U.S. 563, 567 (1950). Contempt sanctions can be severe if that is what is necessary to get a recalcitrant employer's attention.

Cease and desist orders are analogous to permanent injunctions issued in Title VII discrimination cases. Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-5(g) *et seq.* An injunction compels an employer to abide by federal law and, once again, subjects an employer to contempt if future violations are committed. In the Title VII context, the effectiveness of injunctions to reduce the chilling effect of an employer's alleged retaliation on its employees' exercise of their Title VII rights has been recognized. *EEOC v. Goodyear Aerospace Corp.,* 813 F.2d 1539, 1544 (9th Cir. 1987); *Norris v. Arizona Governing Comm.,* 671 F.2d 330 (9th Cir. 1982) (injunction against use of sex-segregated annuity tables), *aff'd in part and rev'd in part on other grounds,* 463 U.S. 1073, 103 S.Ct. 3492 (1983).

A second form of remedy in unfair labor practice cases, which is a component of the cease and desist order, is posting a notice for 60 days informing employees of the substantive obligations of the order. The notice must be posted in a place where it is likely to be observed by employees. The Board may also require an employer to mail notices to each employee. *See, e.g., United Garment Workers,* 295 NLRB 411 (1989). Posting of a notice advises employees about the NLRB's order, and announces the readiness of the employer to obey the order and to "cease and desist" from violating the Act. *NLRB v. Express Pub. Co.,* 312 U.S. 426, 438 (1941). Notice posting is not an

innocuous requirement to employers. As a practical matter, notice posting informs employees of their rights, tells them that the company has been found to have violated the law, and encourages them to come forward with additional allegations of unfair labor practices.

Even when circuit courts have refused to enforce NLRB orders compelling reinstatement with backpay because of employee misconduct, they have still enforced NLRB cease and desist and notice posting orders. *See, e.g., NLRB v. Mutual Maintenance Service Co.*, 632 F.2d 33 (7th Cir. 1980); *NLRB v. Apico Inns of Cal., Inc.*, 512 F.2d 1171 (9th Cir. 1975). Similarly, in this case, the Tenth Circuit could have denied Manso reinstatement and backpay while enforcing the cease and desist and notice posting aspects of the NLRB order.

A third remedial measure traditionally used by the Board is the expungement order. By such orders, the Board requires an employer to remove references to adjudicated and unlawful conduct from its files, notify the employee in writing that this has been done, and to refrain from using the expunged matters against the employee. *See, e.g., Ft. Wayne Foundry Corp., Machining Division*, 296 NLRB 127 (1989); *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). In effect, the employee's record is cleared. For a discharged employee denied reinstatement, that means the grounds for discharge (i.e., tardiness) could not be disclosed in reference checks.

Quite commonly, attorneys' fees and defense costs for an employer confronted with a single person unfair labor practice complaint exceed the amount of backpay in controversy. Employers defend these cases vigorously,

not because backpay and reinstatement would be materially adverse, but because they want to prove innocence and avoid the stigma of a finding against the company.

To deal with employers undeterred by declaratory and injunctive relief, the Board can order "extraordinary" remedies where employers have committed pervasive or outrageous unfair labor practices. For instance, some Board orders have required employers to (i) include a copy of the posted notice in an appropriate company publication, (ii) publish the notice in a local newspaper, (iii) grant a union reasonable access to company bulletin boards, or (iv) grant a union reasonable access to employees in the plant in nonwork areas on nonworking time. *See, e.g., United Dairy Farmers Cooperative*, 242 NLRB 1026 (1979); *Haddon House Food Products*, 242 NLRB 1057 (1979), *enforced as modified; Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1991), *cert. denied*, 454 U.S. 827 (1981).

Another extremely significant weapon in the Board's arsenal is the "visitorial clause." A visitorial clause is an invitation for the Board to oversee the respondent's employment practices. It permits the Board to periodically examine the books and records of an employer, to take statements from officers and employees and nonparties, and to monitor whether the employer is complying with the NLRB's order. *See, e.g., Cherokee Marine Terminal Div.*, 287 NLRB 1080 (1988). By obtaining a visitorial clause, the General Counsel does not need to follow formal post-judgment discovery procedures under FRCP 69 and any information obtained may be used against an employer during contempt proceedings.

Cease and desist orders, notice posting, visitorial clauses, contempt proceedings, and specialized remedies tailored to the particular violation are all effective means at the Board's disposal. If the employer is still not convinced to respect the Act, the Board is not disarmed. This is because stiffer remedies can be crafted to deal with repeat offenders. *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 70 S.Ct. 826 (1950).

A discussion in *NLRB v. Jack La Lanne Management Corp.*, 539 F.2d 292 (2d Cir. 1976) is instructive. There, the Second Circuit enforced a broad cease and desist order against an employer in which the Board required posting in all of La Lanne's 10 health spas in New York City. The court stated:

> The Board is afforded wide latitude in fashioning relief, and its order, which is designed to protect the employees' Section 7 rights, is justified by the repetitive nature of the Company's misconduct.

Id. at 295.

In *United Steelworkers of Am. v. NLRB*, 646 F.2d 616 (D.C. Cir. 1981), the court examined the issue of union access as a remedial measure beyond the plant where the unfair labor practice occurred. The court stated that, "It has long been evident to the Board and the courts that some 'stronger medicine' is necessary to effectuate the policies of the Act in cases of recidivist violators. As a result, it is now firmly established that the Board has the

power to take into account a history of recalcitrance in designing a remedial order." *Id.* at 630.[12]

No employer guided by rational self-interest wants to run the risk of being viewed as a labor outlaw – a repeat violator of the Act. One unfair labor practice case does not put an employer in that category, but the road to extraordinary remedies for unfair labor practices begins with one decision against the company and that is a step few if any businesses will lightly take. The Board's authority to craft broader and more stringent remedies against a recidivist is a meaningful power for purposes of promoting federal labor policy.

Finally, the Board may order employers to pay for the litigation costs of the adjudicatory proceedings. For instance, when an employer's defense to an unfair labor practice complaint is "frivolous," the Board has ordered the employer to reimburse the charging party and the Board for their litigation costs and to reimburse the Union for excess organizational costs. *See, e.g., Electrical Workers (IUE) v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert.*

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[12] *See also NLRB v. S. E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989) (employer's long history of illegal anti-union activity justified imposition of extraordinary remedies); *J. P. Stevens & Co., Inc. v. NLRB*, 612 F.2d 881 (4th Cir. 1980), *cert. denied*, 449 U.S. 918 (1980); *NLRB v. J.H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258 (1969); *Int'l Union of Elect. Radio and Machine v. NLRB*, 426 F.2d 1243 (D.C. Cir. 1970); *J.P. Stevens & Co., Inc. v. NLRB*, 441 F.2d 514 (5th Cir. 1971), *cert. denied*, 404 U.S. 830 (1971); *Textile Workers v. NLRB*, 475 F.2d 973 (D.C. Cir. 1973) (NLRB has power and obligation to take an employer's history of violating the Act into account when ordering remedies in an ULP case).

denied, 400 U.S. 950 (1970), *on remand*, 194 NLRB 1234 (1972), *enforced as modified*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 921 (1974); *Winn Dixie Stores, Inc.*, 224 NLRB 1418 (1976), *enforced in part*, 567 F.2d 1343 (5th Cir.), *cert. denied*, 439 U.S. 985 (1978). The Board can arguably seek reimbursement and costs from employers who are in contempt of a Board order enforced by the circuit court or who are found to be repeat violators of the Act.

Plainly, other remedies for curtailing ULP's are available when the remedy of reinstatement and backpay will not effectuate policies of the NLRA. To award the latter remedy to Manso and other employees who have committed perjury is to elevate perjury to the status of a protected activity under the Act. In summary, refusing enforcement of the Board's order requiring reinstatement and backpay to Manso will accomplish three goals: (1) deterring employers from violating the Act, (2) deterring witnesses from violating their oath, and (3) encouraging the Board to effectively use the Federal Rules of Evidence in performing its factfinding responsibility under the Act.

E. Courts Have Repeatedly Recognized That Rights And Duties Under The NLRA Must Be Balanced With Rights And Duties Under Other Laws.

Rights and duties of individuals and businesses in the United States derive from a complicated scheme of statutes, as well as the Constitution, and cases that have acquired the force of law at different times and in differing circumstances over a few hundred years. The NLRA is one source of rights and duties that is relatively new to

the network of legal obligations in the country. As important as it is, the NLRA must co-exist with other statutes and legal precedent and that has sometimes meant compromise.

One early and ongoing confrontation has been between section 7 rights under the Act and rights of property owners. In *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956), the Court held that an employer's property rights may prohibit the distribution of union literature on the employer's premises by non-employee union organizers if: (1) reasonable efforts through other available channels of communication will enable unions to reach employees, and (2) the employer does not discriminate against the union by allowing distribution of items by other non-employees. More recently, in *Lechmere, Inc. v. NLRB*, ___ U.S. ___, 112 S.Ct. 841 (1992), the Court overturned a Board ruling allowing non-employee organizers to handbill in a shopping mall parking lot.

Another area of tension involves employer speech in union representation campaigns. The prohibition against employer interference with exercise of section 7 rights is at odds with the First Amendment protection of free speech. Again, the NLRA had to be compromised. In *Livingston Shirt Corp.*, 107 NLRB 400 (1953), the Board held that an employer does not commit an unfair labor practice if it makes a pre-election speech on company time and premises to its employees and denies the union's request for an opportunity to reply. *Id.* at 409. This rule was approved in *NLRB v. Steel Workers (Nuton, Inc.)*, 357 U.S. 357 (1958), as long as the union has other means to carry its message to the employees. *See also NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941)

(employers had a constitutional right to express opinions that were non-coercive in nature).

Conversely, the right to engage in conduct protected under a literal reading of section 7 has been held to be constrained by other legal duties. In *Linn v. Plant Guard Worker Local No. 144*, 383 U.S. 53 (1966), a manager sued a union for defamation based on statements in union leaflets which were distributed during an organizing campaign. The Court held that a state defamation action concerning utterances made during an organizing campaign will not be preempted by the NLRA if the complainant can plead and prove that the statements were made with malice and can show actual damages. "Although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party the license to injure the other intentionally by circulating defamatory or insulting material known to be false." 383 U.S. at 61.[13]

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[13] Additionally, intentional infliction of emotional distress claims in some situations are not preempted by the NLRA. In *Farmer v. Carpenters Local 25*, 430 U.S. 290 (1977), a union member claimed that he had been denied job referrals and subjected to a campaign of abuse and harassment by the union. The Court upheld the state court's jurisdiction over the harassment allegation, even though such conduct "might form the basis for unfair labor practice charges before the Board." *Id.* at 302. *See also Keehr v. Consolidated Freightways of Del., Inc.*, 825 F.2d 133 (7th Cir. 1987) (intentional infliction of emotional distress and privacy claims based on verbal and physical abuse by supervisor not preempted); *Saquin v. Haley Bros., Inc.*, 652 F. Supp. 581 (C.D. Cal. 1987) (state tort claims for breach of implied covenant of good faith and fair dealing and intentional infliction of emotional distress arising from wrongful discharge not preempted by NLRA where actions giving rise to discharge were not concerted activities).

There are even areas where rights and duties under the NLRA have given way to societal values that do not have a specific source of legal protection. One example is entrepreneurial rights. The Court has directed that a balancing test must be applied when the duty to bargain under Sections 8(d) and 8(a)(5) of the Act abridges core management objectives. *See Fibreboard Paper v. NLRB*, 379 U.S. 203, 213 (1964); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981) (employer was not obligated to bargain over cancellation of customer contract – bargaining over management decisions affecting availability of employment required only if the benefit for labor-management relations outweighs burden on conducting business).

A similar balance must be struck between carrying out the policy of the NLRA with deterring obstruction of justice through perjury. The Court has made clear that promoting truth in testimony is a vital public concern:

> Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when the witness' statement has once been made. . . . [T]he oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance and delay of

> ultimately extracting the truth by cross examination, by extraneous investigation, or other collateral means.

United States v. Norris, 300 U.S. 574 (1937).[14] By ordering reinstatement and backpay to Mr. Manso, the Board ignored this refrain.

The Board cannot follow an ambiguous course of allowing deliberately false testimony to go undeterred in some instances and not in others. A bright line test is needed. To maintain the integrity of the oath administered at NLRB hearings, the Board must be prohibited from awarding reinstatement and backpay when a charging party or discriminatee deliberately testifies falsely about facts relating to his/her conduct and the employment practice at issue in the case.

II.

THE AWARD OF REMEDIAL RELIEF IN THIS CASE IS INCONSISTENT WITH DECISIONS CONSTRUING ANALOGOUS STATUTORY SCHEMES AND WITH THE TREATMENT OF PERJURY IN THE FEDERAL COURTS.

The reinstatement and backpay provisions of the NLRA are closely analogous to similar provisions of Title VII of the Civil Rights Act of 1964, as amended.[15] Indeed,

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[14] *See also United States v. Mandujane*, 425 U.S. 564 (1976), quoted on page 16 above. 18 U.S.C. § 1621 applies to false testimony in an administrative hearing. Perjury is defined in note 8 above.

[15] *Compare* 29 U.S.C. § 160(c) (the Board, upon finding that an unfair labor practice has been committed, shall "take such affirmative action including reinstatement of employees with or without back pay" to effectuate the policies of the Act) *with* 42 U.S.C. § 2000e-5(g) (upon finding that an unlawful employment practice has been committed, the district court may enjoin the practice "and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay").

the backpay provision of Title VII was, as this Court has observed, expressly modeled on the backpay provision of the NLRA. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 777 n.39 (1976) (observing in dictum that make whole remedy under NLRA is narrower than Title VII counterpart). Given the similarities between the two statutory schemes, an analysis of Title VII jurisprudence in the area of employee falsification and lying is instructive and demonstrates the flaws in the decision of the Board and Tenth Circuit.

It is well settled under Title VII that evidence of employee misconduct, including intentional falsifications and misrepresentations, acquired by the employer after discharge of the employee should be considered by the court in determining whether the employee's discharge was wrongful and, if so, what remedies for such discharge are available to the employee. Although there is a split between the various Circuit Courts of Appeals that have addressed the question of the legal effect to be given such evidence, the cases have uniformly held that, at a minimum, such evidence bars or limits an employee's right to recover damages and disqualifies the employee from reinstatement entirely.

A. After Acquired Evidence Cases Holding That All Relief Under Title VII Is Barred.

The Sixth and Seventh Circuits, ironically applying the rationale of the Tenth Circuit in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), have held that employees engaging in deliberate falsifications both before and after the commencement of their employment, are barred completely from any relief under Title VII. *Summers*, 864 F.2d at 708 (falsehoods by employee after commencement of employment); *Milligan-Jensen v. Mich. Technological Univ.*, 975 F.2d 302, 304-5 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2991 (1993) (false statements in employment application regarding prior conviction for driving under the influence of alcohol); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 415 (6th Cir. 1992) (false statements in employment application regarding educational background); *Washington v. Lake County, Ill.*, 969 F.2d 250, 253-57 (7th Cir. 1992) (false statements in employment application). Under each of the above decisions, employees engaging in deliberate misrepresentations to their employers, much less egregious than the falsehoods told by Mr. Manso under oath, have been denied all relief under Title VII.

B. After Acquired Evidence Cases Holding That Relief Under Title VII Is Limited Rather Than Barred.

The Eleventh Circuit, while declining to adopt the *Summers* rationale, has nonetheless held in a Title VII and Equal Pay Act case that evidence of an employee's application fraud, discovered after she had filed suit, barred

the employee from the prospective remedies of reinstatement, front pay or injunctive relief. *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174, 1181-82 (11th Cir. 1992). In its analysis of the *Summers* holding, the Court in *Wallace* observed that reinstatement or front pay to the employee would go beyond making the employee whole and would unduly limit the employer's freedom to lawfully discharge employees. *Id.* at 1182. Moreover, the Court limited the employee's eligibility for backpay to the time period at which the employer would have discovered the false statements of the employee in the absence of the employer's allegedly unlawful acts and the related litigation. However, even under this analysis, reinstatement of the employee was held to be improper by virtue of the employee's deliberate falsifications. *Id.*

Plainly, the Title VII and Equal Pay Act cases forcefully support the proposition that an employee who has deliberately lied to his employer should not be entitled to retain his employment status. The Board's decision to the contrary in this case, as affirmed by the Tenth Circuit, is repugnant to the analogous Title VII jurisprudence and should be reversed. Moreover, this Court's grant of certiorari in *Milligan-Jensen* should have no effect whatsoever on the universally accepted principle that evidence of employee misrepresentations and falsifications results, at a minimum, in the denial of reinstatement and the elimination or reduction in backpay. Further, such analogous cases do not involve issues of a party seeking relief while lying under oath in a legal proceeding.

C. Treatment Of Perjury And Falsification Of Evidence In Federal Litigation

By affirming the Board's award of reinstatement and backpay to Manso, the Tenth Circuit has rewarded Manso for perjury in a manner completely inconsistent with the general treatment of perjury and falsification of evidence in the federal courts. Contrary to the permissive approach taken by the Board and the Tenth Circuit in this case, the federal courts have consistently taken an extremely dim view of perjury and falsification of evidence in the federal courts, applying the most extreme and severe sanctions available for such misconduct.

For instance, in *Pope v. Federal Express Corp.*, 138 F.R.D. 675 (W.D. Mo. 1990), *aff'd in part and vacated in part on other grounds*, 974 F.2d 982 (8th Cir. 1992), the district court found that the plaintiff in a Title VII action had manufactured a document in support of her claim of sexual harassment. Such conduct, the court held, violated Fed. R. Civ. P. 11 and warranted the dismissal of the lawsuit in its entirety pursuant to Rule 11 as well as the court's inherent equitable power to impose sanctions. 138 F.R.D. at 683. On appeal, the Eighth Circuit acknowledged that dismissal of the lawsuit was a severe sanction, yet nonetheless found that the district court had not abused its discretion in dismissing the case and in finding "that manufactured evidence and perjured testimony had been introduced in an attempt to enhance the case through fraudulent conduct." 974 F.2d at 984. As noted by the Eighth Circuit:

> When a litigant's conduct abuses the judicial process, the Supreme Court has recognized dismissal of the lawsuit to be a remedy within the inherent power of the court.

Id., citing Chambers v. NASCO, Inc., ___ U.S. ___, 111 S.Ct. 2123, 2133 (1991).

Similarly, severe sanctions have been imposed by the federal courts for abuse of the discovery process. The federal courts have not hesitated to dismiss lawsuits under Fed. R. Civ. P. 37 where the conduct of a party or the party's counsel has been evasive, contumacious and resulting, at least in part, from intentional misconduct. *See Bluitt v. Arco Chemical Co.*, 777 F.2d 188, 190-91 (5th Cir. 1985) (dismissal of Title VII sex discrimination case affirmed where the court concluded that the plaintiff's "evasive and contumacious" conduct had resulted, at least in part, from intentional misconduct); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781 (1976) (dismissal of lawsuit affirmed by reason of respondents' flagrant "bad faith" and their counsel's "callous disregard" of their responsibilities).

Manso's conduct in testifying about facts he knew to be untrue would, in the context of litigation in the federal district courts, expose him to the harshest sanctions available under federal law. The Board's award of reinstatement and backpay in this case is illogical and inconsistent with the legal and ethical standards by which litigants appearing in federal proceedings are bound and should be reversed. Petitioner urges that the Court make clear that interested witnesses found to have deliberately violated their oath by giving false testimony in unfair labor

practice hearings will not be allowed to directly benefit by the outcome of the case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the decision of the Tenth Circuit be reversed, and this case be remanded to the Tenth Circuit with instructions to vacate its order enforcing the award of reinstatement with backpay.

Respectfully submitted,

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No. 92-1550

In the Supreme Court of the United States

OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board has authority to remedy an unfair labor practice by ordering an employee's reinstatement with backpay, even though the employee purposefully testified falsely during the administrative hearing.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A20, is reported at 982 F.2d 441. The decision and order of the National Labor Relations Board (Board), Pet. App. B1-B28, including the decision and recommended order of the administrative law judge, Pet. App. B29-B68, is reported at 304 N.L.R.B. 585.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1992. The petition for a writ of certiorari was filed on March 24, 1993, and was

granted on June 14, 1993, limited to the third question presented by the petition. J.A. 35. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a trucking terminal in Albuquerque, New Mexico. Pet. App. A7. Petitioner employs both regular and casual dockworkers at that facility. *Ibid.* In April 1988, petitioner negotiated a supplemental labor agreement with the Union [1] that created a new "preferential casual" dockworker classification with certain seniority rights. *Id.* at B4, B6. On June 20, based on its interpretation of the agreement, petitioner discharged twelve casual dockworkers, including employee Michael Manso. On June 29, petitioner offered to reinstate those who agreed to waive their right to placement on the "preferential casual" list. *Id.* at B7, B13.

The Union filed a grievance on behalf of the dischargees, and Manso filed an unfair labor practice charge with the Board against petitioner. Pet. App. B8, B30 n.1. On April 6, 1989, a grievance panel ordered petitioner to offer the discharged employees reinstatement as preferential casuals but denied all monetary claims. *Id.* at B9-B10. When Manso returned to work, three of petitioner's operations supervisors warned him that petitioner intended to retaliate against him. Chris Lovato warned Manso that he should watch his step because petitioner was "gunning" for him. Pet. App. B46; J.A. 96. Thomas McNutt assured Manso that he was not responsible

[1] Petitioner's employees were represented by Local 492, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union).

for Manso's discharge and warned Manso to be careful because "the higher echelon was after [him]." Pet. App. B46; J.A. 96-97. Kyle Beeson said to Manso, "Well, it looks like you made it back. Let's see how long it takes them to get rid of you this time." Pet. App. B46; J.A. 98-99.[2]

On June 19, less than two months after his return, petitioner discharged Manso, ostensibly for a second failure to respond to a work call. Pet. App. B15.[3] Manso filed a grievance, and a grievance panel ordered petitioner to reinstate him without backpay. *Id.* at B47.

Manso again returned to work. On August 11, 1989, he reported for his shift four minutes late and received a written warning. Pet. App. B47. At that time, petitioner had no specific lateness policy applicable to preferential casuals. After Manso re-

[2] In the administrative hearing, Lavato (J.A. 91-92), McNutt (J.A. 118) and Beeson (J.A. 56) denied that they had made those statements. The administrative law judge, however, credited Manso's testimony on this matter. Pet. App. B46.

[3] Petitioner's policy was that preferential casuals were required to be available by phone before a shift, in case they were called in to work. Should they be needed, a regular dockworker would dial the employee's number; if no one answered, the dockworker would verify that fact. Pet. App. B51. On May 6, Manso failed to respond to a phone call summoning him to work, and petitioner issued him a written warning. On June 19, supervisor Ronald Ford asked Jeff Motter, a regular dockworker, to summon Manso for work on the 8:30 a.m. shift. Motter placed a telephone call and recevied no answer. Motter told Ford he might have misdialed Manso's number, but Ford refused permission to redial and insisted that Motter sign a form verifying that he had placed the call. Pet. App. B47.

ported late on August 11, however, petitioner decided that preferential casuals (although not other employees) would be discharged if they were late twice without good cause. *Id.* at B16-B17; J.A. 69, 78-79.

About 5:25 a.m. on August 17, Manso telephoned petitioner and explained that he would be late for his 5:00 a.m. shift because he had experienced car trouble on the way to work. When Manso arrived at work at approximately 5:50 a.m., petitioner's officials asked him why he was late. Manso said that his car broke down on the highway; that he had abandoned the car, walked to a pay phone at a gas station, and, after phoning petitioner, called his wife to pick him up and drive him to work; and that when his wife arrived, he began driving to the terminal with her, but was stopped by a police officer for speeding. Pet. App. B58; J.A. 104-106.

Because petitioner's officials doubted Manso's explanation, they investigated it. Pet. App. B58; J.A. 72. Terminal manager Mike Long was unable to find the car Manso claimed he had abandoned on the highway. Operations manager Ed Fultz learned that police officer Derryl Smith had stopped Manso because he was speeding, not to assist him with his car trouble. J.A. 73-74. Petitioner then discharged Manso, ostensibly pursuant to its policy requiring discharge after two incidents of tardiness without legitimate excuse. Pet. App. B16, B48; J.A. 76. Petitioner did not confront Manso with its suspicion that he was lying, because it terminated him for "tardiness." Pet. App. B16; J.A. 87-88.

Manso filed a grievance, but did not pursue it after the first-step grievance committee upheld the discharge. Pet. App. B48. Thereafter, he filed a second

unfair labor practice charge with the Board against petitioner. *Id.* at B30 n.1.

2. The administrative law judge (ALJ) concluded that the statements made to Manso by supervisors McNutt, Lavato, and Beeson when he returned to work after his first discharge violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), because they threatened future retaliation for his protected activity of filing a grievance and an unfair labor practice charge.[4] The ALJ also concluded that petitioner's discharge of Manso in June 1989 violated Section 8(a)(1), (3), and (4) of the Act,[5] because petitioner fired him in retaliation for participating in the grievance filed by the Union regarding petitioner's termination of the casual dockworkers in June 1988, and for filing a charge with the Board in connection with the incident. Pet. App. B15, B57-B58. The ALJ explained that the circumstances of the discharge showed "a motive directed not toward filling out [petitioner's] complement of employees for the morning shift but of arming itself with a justification for discharging an unwanted employee." *Id.* at B58.

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[4] Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

[5] Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act.

The ALJ found, however, that "Manso was lying to [petitioner] when he reported that his car had overheated and that he was late for work because of car trouble." Pet. App. B59.[6] The ALJ concluded that petitioner had discharged Manso on August 17 for cause, rather than for activities protected by the Act. *Ibid.*

3. The Board agreed with the ALJ that petitioner's June discharge of Manso was unlawful. Disagreeing with the ALJ, however, the Board found that the August 17 discharge also violated Section 8(a)(1), (3) and (4) of the Act. Pet. App. B21. The Board determined that the supervisors' threats of retaliation and Manso's subsequent unlawful discharge in June provided "strong evidence" of an unlawful motivation for the August discharge. *Id.* at B18. The Board further determined that the ALJ's conclusion that petitioner lawfully fired Manso because Manso lied about his reason for being late on August 17 was premised on "a plainly erroneous factual statement of [petitioner's] asserted reasons" for the discharge. *Ibid.* The testimony of petitioner's operations manager, Ed Fultz, who signed the discharge letter, made it clear that Manso was not fired for dishonesty; rather, Manso's lie established only that he did not have a legitimate excuse for being late and he was thus subject to discharge under the newly instituted policy that two incidents of unex-

[6] The ALJ relied on the branch manager's inability to locate Manso's abandoned car and the testimony of officer Smith that "there was no one in the car with Manso when [the officer] stopped to give Manso a warning for excessive speed." Pet. App. B58-B59; J.A. 126.

cused lateness were grounds for discharge. Pet. App. B16; J.A. 87-88.[7]

Noting that petitioner had employed a novel retroactive application of its lateness policy in discharging Manso, Pet. App. B20,[8] the Board concluded that petitioner had seized on Manso's second tardiness on August 17 "as a pretext to discharge him again and for the same unlawful reasons it discharged him" in June. *Id.* at B21. Accordingly, the Board ordered petitioner to cease and desist from its unfair labor practices, to make Manso whole for any loss of earnings and benefits suffered as a result of his August 17, 1989 discharge, and to offer him immediate reinstatement as a preferential casual dockworker.[9] *Ibid.*

[7] The Board acknowledged that "giving dishonest excuses for lateness" could constitute good cause for employee discharge. Pet. App. B18 n.13. The Board observed, however, that "[petitioner] provided no evidence that it had treated Manso's dishonesty in and of itself as an independent basis for discharge or any other disciplinary action." *Id.* at B18.

[8] The Board observed that petitioner had not established its lateness policy until after Manso's first infraction on August 11, but applied that policy retroactively to discharge him on the basis of the August 11 and August 17 episodes. Pet. App. B20. By contrast, petitioner did not apply its policy about failure to respond to work calls to events occurring before it had adopted the policy. *Ibid.*

[9] Petitioner made a brief challenge to that remedy, asserting it would violate public policy and "undermine legal process" for the Board to grant relief to a charging party who was untruthful. J.A. 31. In several previous cases, the Board had indicated that it did not regard lack of truthfulness as a per se bar to make-whole relief, see, *e.g.*, *Owens Illinois, Inc.*, 290 N.L.R.B. 1193 (1988), enforced mem., 872 F.2d 413 (3d Cir. 1989), and the Board did not specifically respond to petitioner's contention here. See also notes 13-14, *infra*.

4. The court of appeals affirmed the Board's finding that petitioner fired Manso in August 1989 in retaliation for his protected activities, and not for cause. Pet. App. A18. Reviewing the record under the framework approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), the court of appeals held that there was "abundant evidence of antiunion animus in [petitioner's] conduct towards Manso," Pet. App. A16, and petitioner did not show that it would have discharged him in the absence of his protected activity. *Id.* at A18.

The court of appeals also rejected petitioner's assertion that, because Manso lied to petitioner about the reason for his tardiness on August 17, 1989, and repeated that story during his testimony before the ALJ in the unfair labor practice proceeding, the Board was barred from ordering his reinstatement with backpay. Pet. App. A18-A19. The court noted that the Board has "wide discretion in assessing whether, in its judgment, a particular remedy will effectuate the policies of the Act," and held that the Board did not abuse its discretion in deciding that Manso's conduct "did not rise to the level of misconduct requiring that reinstatement should be denied." *Id.* at A19. The court noted that "Manso's original misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus." *Ibid.* Accordingly, the court enforced the Board's order requiring petitioner to reinstate Manso with backpay. *Id.* at A14, A20.

SUMMARY OF ARGUMENT

The issue in this case is a narrow one: whether the Board must deny reinstatement with backpay as relief for an unfair labor practice whenever the discharged employee has testified falsely during a Board hearing. While rejecting such a per se rule, the Board does not mandate reinstatement regardless of how abusive of the Board's processes the employee has been. Rather, the Board has adopted a middle ground that takes into account the need to redress unfair labor practices as well as the need to protect the agency and the employer's interests. The Board's rule is a reasonable one that is entitled to deference from the courts.

A. Under Section 10(c) of the Act, the Board has authority to remedy unfair labor practices with "such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]." 29 U.S.C. 160(c). In devising remedies, the Board has considerable discretion, subject only to limited judicial review. A court may set aside the Board's remedial order only when "it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

Reinstatement with backpay—make-whole relief—is the Board's traditional remedy for an unlawful termination of employment. That remedy not only restores the employee to the position he should have occupied, but dispels the effect of the unfair labor practice on the exercise of rights by other employees. The Board has discretion, however, to withhold that remedy when its beneficiary has abused the administrative process.

B. The Board has determined that when an employee has given false testimony in support of a claim before the Board, the employee does not automatically forfeit make-whole relief. If an employee has generally been trustworthy in testimony, and has not engaged in wholesale abuse, it is unnecessary to withhold reinstatement with backpay to vindicate the integrity of the Board's processes. Where, however, the abuse is more serious, backpay may be forfeited from the time of the misconduct. And where the employer shows that the misconduct has rendered the employee unfit for further employment, reinstatement is forfeited as well.

In contrast to the per se rule advanced by petitioner, the Board's rule permits it to take account of the specific circumstances of a case. The Board is thereby able to frame a make-whole remedy calculated to neutralize an employer's unfair labor practice in the most effective way, absent a demonstrated need to sacrifice that end in the interest of the integrity of the Board's processes or the employer's business needs.

C. The Board's rule is within the scope of its authority. The rule aims at redressing the effects of a proven unfair labor practice and therefore is legitimate under *Virginia Elec. & Power Co.*

The need to uphold the integrity of the Board's proceedings does not compel a per se rule denying make-whole relief for an employee who testifies falsely to the Board. No provision of the Act mandates that result. Even if a comparable rule prevailed at common law or in other tribunals, the Board would be free to depart from it in order to achieve the purposes of the Act. Moreover, the Board does not ignore perjury; it can refer suspected cases for criminal prosecution. A per se rule, however, would

require the Board to apply a selective penalty to untruthful employees, while failing to apply similar remedies to untruthful employers who violate the Act.

The possibility of alternative remedies for unfair labor practices does not require the Board to withhold make-whole relief as a sanction for employee perjury. Remedies such as cease-and-desist orders, notice-posting, and contempt proceedings serve valuable purposes. They are less effective than reinstatement, however, in restoring the status quo ante or telling the rest of the workforce that their employer may not retaliate against protected activity with impunity.

Finally, the Board's rule is not incompatible with the employer's legitimate interest in keeping dishonest employees off the workforce. Nothing in the Board's rule prevents an employer from terminating an employee for dishonesty. But when an employer terminates an employee out of anti-union animus, the Board has latitude to frame an appropriate remedy. The Board permits the employer to avoid reinstatement if it can establish that the employee's lie renders him unfit for service or that his return would jeopardize company efficiency. Here, no such showing has been attempted. And as in many cases involving relatively mild infractions, it is unlikely that any such showing could be made. In view of the Board's mandate to grant effective remedies for unfair labor practices, the Board's approach is within its sound discretion.

ARGUMENT

THE BOARD MAY ORDER REINSTATEMENT WITH BACKPAY OF AN EMPLOYEE TO REDRESS AN UNFAIR LABOR PRACTICE, EVEN THOUGH THE EMPLOYEE LIED DURING THE ADMINISTRATIVE HEARING

Petitioner requests this Court to mandate that an employee who lies during an administrative hearing automatically forfeits the right to reinstatement with backpay as a remedy for the employer's unfair labor practice. Nothing in the Act supports the imposition of such a per se rule on the Board. Exercising its authority under the Act to remedy violations, the Board has balanced the competing policy interests and has determined that a discriminatee who makes false statements at a Board hearing may, but does not automatically, forfeit his or her right to reinstatement and backpay. The Board's approach is a reasonable one and is entitled to deference from the courts.

A. The Board Has Remedial Discretion To Require An Employee's Reinstatement With Backpay As A Means Of Effectuating The Public Policies Of The Act

Section 10(c) of the Act empowers the Board to remedy an unfair labor practice by requiring a person who has violated the Act to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]." 29 U.S.C. 160(c). In remedying unlawful employer discrimination, the Board does not vindicate "private rights," but acts "in a public capacity to give effect to the declared public policy of the Act" to encourage collective bargaining

and to protect the right of workers to organize. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 193 (1941) (internal quotation marks omitted); *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 543 (1943).

This Court has "accorded the Board considerable authority to structure its remedial orders to effect the purpose of the [Act] and to order the relief it deems appropriate." *Litton Financial Printing Division* v. *NLRB*, 111 S. Ct. 2215, 2223 (1991); *Shepard* v. *NLRB*, 459 U.S. 344, 349 (1983); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-347 (1953). "The particular means by which the effects of unfair labor practices are to be expunged are matters for the Board not the courts to determine." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. at 539 (internal quotation marks omitted); *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 899 (1984) (courts "should not substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices"); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. at 346, 348. That principle of deference is given substance through the requirement that a court may reject the Board's remedy only when "it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. at 540; *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. at 347; cf. *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In granting relief for an unlawful termination of employment, the Board's normal remedy is re-

instatement with backpay. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. at 187. Such make-whole relief prevents the employer's "enjoyment of any advantage which he has gained by violation of the Act," *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 364 (1940), and thereby permits "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge*, 313 U.S. at 194. Reinstatement and backpay do not serve only as "protection for the victimized employee"; they also serve the more important objective of "[a]voidance of labor strife [and] prevention of a deterrent effect on the exercise of rights guaranteed employees by [Section] 7 of the Act." *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 185 (1973).

The Board long ago explained the direct connection between reinstatement orders and the advancement of the overall goals of the Act. In *Phelps Dodge Corp.*, 35 N.L.R.B. 418 (1941), the Board determined that reinstatement was warranted even though the particular employees discharged had obtained equivalent employment elsewhere. The Board explained that its order was necessary to remove the effects of an unlawful discharge on the remainder of the work force. "The Act postulates, and the fact is readily verified by common experience, that anti-union discrimination exercises a coercive effect not only upon the immediate victim, but upon all present or future employees of the particular employer; it impresses upon them the danger to their welfare and security associated with membership in or activity on behalf of a labor organization." *Id.* at 420 (internal quotation marks omitted). "Accordingly,"

the Board noted, "the purpose of the order to offer reinstatement is not only to restore the victim of discrimination to the position from which he was unlawfully excluded, but also, and more significantly, to dissipate the deeply coercive effects upon other employees who may desire self-organization, but have been discouraged therefrom by the threat to them implicit in the discrimination." *Ibid.* (internal quotation marks omitted).

This Court echoed that justification in upholding a Board order requiring a successor employer to reinstate employees with backpay as a remedy for discriminatory discharges by the predecessor employer. See *Golden State Bottling*, *supra*. The Court explained that, "[t]o the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action." 414 U.S. at 184. And, if the employees "do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities" and "a leadership vacuum in the bargaining unit." *Id.* at 184-185.

Although it often serves paramount public purposes, reinstatement with backpay is not an automatic remedy. Where the charging party has engaged in misconduct, the Board "may decline to be imposed upon or to submit its process to abuse." *NLRB* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18-19 (1943) (Board may dismiss a complaint if it is related to a scheme of violence to coerce illegal aims). It is the task of the Board to reconcile the goals of protecting the integrity of its processes, on the one

hand, and effectuating the public purposes of the Act, on the other.

B. The Board Has Balanced The Competing Interests In Determining That An Employee Who Testifies Falsely At An Administrative Hearing Does Not Automatically Forfeit Make-Whole Relief

In determining whether, and to what extent, to withhold the remedy of reinstatement and backpay from a discriminatee who has lied in a Board proceeding, the Board has considered the need to deter conduct abusive of the Board's processes and the need to remedy the consequences of unfair labor practices. The Board's approach to the issue of false testimony by a charging party rejects a per se rule in favor of a more balanced analysis, and the facts of this case illustrate the appropriateness of that approach.

1. When faced with misconduct by charging parties in Board proceedings, the Board attempts to tailor its remedies to the magnitude of the transgression. The Board's rule in the area of concealment of earnings during back-pay proceedings illustrates that approach. In *American Navigation Co.*, 268 N.L.R.B. 426 (1983), the Board ruled that "discriminatees found to have willfully concealed from the Board their interim employment will be denied backpay for all quarters in which they engaged in the employment so concealed." *Id.* at 427. The Board reasoned that, although "to award full backpay to a claimant who attempts to pervert an order issued in the public interest into a scheme for unjustified personal gain is to reward perfidy," to deny more backpay than is necessary to deter deception is "to provide a respondent with an unjustified windfall and to permit it to avoid the consequences of its unlawful conduct

for no useful purpose." *Id.* at 428. The Board concluded that a remedy that denies backpay for the quarters in which concealed employment occurred "will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondents from committing future unfair labor practices." *Ibid.*[10]

The Board's approach when a discriminatee makes false statements at a Board hearing or otherwise interferes with the integrity of the Board's processes similarly reflects a balancing of interests. In *Owens Illinois, Inc.*, 290 N.L.R.B. 1193 (1988), enforced mem., 872 F.2d 413 (3d Cir. 1989), the Board awarded reinstatement with backpay to an employee who gave false testimony at the unfair labor practice hearing. In concluding that it would not effectuate the policies of the Act to deny the employee a full remedy, the Board noted that the ALJ had not found her to be a generally untrustworthy witness, but had credited the "major portion" of her testimony and relied on it in finding that her employer violated the Act in discharging her. 290 N.L.R.B. at 1193. With respect to reinstatement, the Board noted that

[10] The Board thus overruled its prior approach that denied backpay only as to specific amounts of concealed earnings. *American Navigation Co.*, 268 N.L.R.B. at 427. The Board reaffirmed, however, its decisions in *M.J. McCarthy Motor Sales Co.*, 147 N.L.R.B. 605 (1964), and *Great Plains Beef Co.*, 255 N.L.R.B. 1410 (1981), under which claimants whose intentionally concealed employment cannot be attributed to a specific quarter or quarters because of the claimant's deception are denied all backpay. *American Navigation Co.*, 268 N.L.R.B. at 428 n.6.

> [w]hen seeking to be excused from his obligation to reinstate or to pay backpay to a discriminatee because of misconduct which was not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant.

Id. at 1193, 1194 n.5 (internal quotation marks omitted). In *Owens Illinois*, the respondent had "completely failed to meet its burden of establishing that [the discriminatee] is unfit for further employment," *id.* at 1193, because it did not introduce evidence "to establish that [the discriminatee's] false testimony would have any impact on her performance if reinstated." *Id.* at 1194.[11]

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[11] The Board's analysis in *Owens Illinois* was foreshadowed to some extent by earlier cases. While in *O'Donnell's Sea Grill*, 55 N.L.R.B. 828 (1944), the Board stated, without further explanation, that an employee's "record of absenteeism combined with his lack of candor on the witness stand, was such that, upon the entire record, we do not believe that his reinstatement would effectuate the policies of the Act," in *Clayton E. Smith*, 126 N.L.R.B. 1325, 1326 (1960), the Board granted relief despite the fact that an employee tried to withdraw his charges and claimed they were false; while recognizing that this impeded the Board's investigation, the Board saw the employee's intent to curry favor with the former employer as a mitigating factor. Later, in *D.V. Copying & Printing, Inc.*, 240 N.L.R.B. 1276 (1979), the Board explained that suborning perjury at a Board hearing warranted the withholding of make-whole relief from the time of the misconduct, because suborning perjury "constitutes deliberate and malicious conduct * * * calculated to abuse and undermine

Lear-Siegler Management Service Corp., 306 N.L.R.B. 393 (1992), illustrates the application of these principles. There, the Board denied reinstatement and tolled the amount of backpay due a discriminatee who interfered with the Board's processes by attempting to influence and manipulate a witness.[12] The Board held that a discriminatee who so interferes with the Board's processes forfeits his or her right to backpay beyond the date of the impermissible interference. The Board explained:

> [T]his remedy strikes a balance between the competing and equally important interests of protecting the Board's judicial processes and remedying unfair labor practices. Denying backpay after the date of the threat protects the integrity of the Board's processes by providing that those who abuse the process cannot turn

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Board processes." *Id.* at 1276 n.1. And in *Service Garage, Inc.*, 256 N.L.R.B. 931 (1981), enforcement denied on other grounds, 668 F.2d 247 (6th Cir. 1982), an employee who was younger than the minimum age required by his present employer overstated his age in testimony; the Board indicated that the employee's lie did not "amount to a malicious abuse of the Board's processes under circumstances which require forfeiture of remedy to effectuate the purposes of the Act," since the lie "did not go to the heart or even to the periphery of the Board's processes" and was not intended to undermine, nor did undermine, the Board's proceedings. 256 N.L.R.B. at 931.

[12] The discriminatee believed that a witness planned to testify favorably to him at the Board hearing. When the discriminatee later heard a rumor that the witness was in fact going to testify unfavorably to him (testimony that the discriminatee believed to be untruthful), he threatened the witness that he would report an alleged violation of the witness's probation if the witness changed his anticipated testimony. *Lear-Siegler*, 306 N.L.R.B. at 403-404.

around and use the process to reap a full remedy. Granting backpay until that date also ensures that a respondent's unlawful discrimination does not go unremedied.

306 N.L.R.B. at 394 (footnote omitted).

The Board also held in *Lear-Siegler* that the discriminatee's interference with the Board's processes, though sufficient to warrant tolling of his right to backpay, did not, standing alone, warrant forfeiture of his right to reinstatement. 306 N.L.R.B. at 394. The critical inquiry respecting reinstatement "concern[s] [the discriminatee's] fitness for return to the workplace." *Ibid.* On the facts presented, the Board found the discriminatee unfit for further employment because his "blatant threat of specific consequences to [the witness's] well-being * * * was of a nature likely to produce in [the witness] a continuing fear that any workplace disputes with [the discriminatee] might result in a revival and possible implementation of the threat." *Ibid.*

2. Petitioner does not claim that, under the Board's approach in *Owens Illinois* and *Lear-Siegler*, Manso's untruthfulness warranted the denial of reinstatement and backpay. Rather, petitioner argues (Br. 7-8, 35-36) for a blanket rule that would deny make-whole relief to any employee who was untruthful.[13] As the facts of this case indicate, the Board's

[13] At the administrative level, petitioner's objection to relief in favor of Manso was so cursory that the Board may well have elected to disregard it. The Board's rules require specificity in raising an exception, as well as citation of supporting authority, 29 C.F.R. 102.46(b)(1). They further provide that "[a]ny exception which fails to comply with the foregoing requirements may be disregarded." 29 C.F.R. 102.46(b)(2). Petitioner argued only that "[t]he Act does not reward perjury and a decision allowing Charging Party to benefit by his inveracity to ABF and the Board would undermine legal process," while citing no supporting authority. J.A. 31. That assertion was contrary to *Owens Illinois*, and the Board may well have viewed it as requiring no response.

more balanced approach permits it to consider relevant circumstances that bear on the appropriateness of make-whole relief, which petitioner's rule would require the Board to ignore.[14]

In determining whether to award backpay, the Board looks to the employee's overall veracity, not simply to the portion of his testimony that was false. Manso was not a witness totally unworthy of belief. The ALJ credited his testimony in all respects other than that concerning his reason for being late on August 17; indeed, the ALJ credited Manso's testimony over that of petitioner's supervisors in finding that they had threatened future retaliation against Manso for his protected activities (see note 2, *supra*). Moreover, in explaining his lateness to petitioner, Manso did not lie about the reason for being late for a malicious purpose, but to protect himself from a *second* discharge under a policy that he believed, and the Board subsequently found, was being applied to

[14] At this juncture, petitioner has waived any claim that Manso should have been denied relief under the Board's approach. Petitioner did not raise that contention before the Board, and under Section 10(e) of the Act, 29 U.S.C. 160(e), "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). Moreover, petitioner did not make such a claim in the court of appeals, nor does it make that claim in this Court.

him because he had filed unfair labor practice charges and grievances. While Manso repeated his lie to the ALJ, his lie did not influence the Board's unfair labor practice determination.[15] The Board found that petitioner discharged Manso not for lying, or even for being tardy twice without a sufficient excuse, but as a reprisal for his having engaged in protected activities. Petitioner's lie was thus not part of a whole scheme that subverted the Board's processes.[16]

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[15] It is true that Manso could have explained the reason for his fabrication to the ALJ, rather than persist in the fabrication. Despite his failure to do so, however, the Board reasonably could consider the impetus for Manso's initial fabrication to be a mitigating factor. When Manso gave his false testimony, he had already suffered three discharges (in June 1988, June 1989, and August 1989), which either the ALJ or the Board (or both) found were unlawful. A lie uttered by an employee trapped in those somewhat unusual circumstances may reasonably be characterized as less deserving of sanction than a lie given by an employee who has not endured a similar history of mistreatment by the employer. And the employee's adherence to his story before the ALJ, though unjustifiable, is understandable.

[16] Amicus American Trucking Association (ATA) relies Br. 8-9) on the definition of "materiality" under the federal perjury statute to argue that Manso's fabrication was material because it had the potential to influence the Board's decision. In exercising its remedial discretion, however, the Board is not bound by the definition of materiality in a criminal proceeding. It is well within the Board's discretion to withhold the harsh sanction of denial of make-whole relief when the fabrication was irrelevant to its determination. See *Service Garage, Inc.*, 256 N.L.R.B. 931, 931 (1981), enforcement denied on other grounds, 668 F.2d 247 (6th Cir. 1982); cf. *J.P. Stevens & Co.* v. *NLRB*, 638 F.2d 676, 688-689 (4th Cir. 1980) (count declined to disturb ALJ's conclusion that the

In determining whether to grant reinstatement, the Board focuses on the employee's fitness to return to the workplace. The employer has the burden to establish that the employee is unfit for further employment, and "speculation" that the employee is unfit because he testified falsely is insufficient. *Owens Illinois*, 290 N.L.R.B. at 1193. Here, there is no concrete showing that petitioner's conduct at the hearing rendered him unfit for further employment as a dockworker. Manso's lie concerned his actions off the job and was not directly related to the conduct of petitioner's business. It did not misrepresent anything that occurred at the employer's premises or during the course of work. Moreover, petitioner's "officials who testified were also discredited by the judge * * * and there is no indication [that the employer] took any action whatsoever against those officials."[17] *Id.* at

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employee's "dissembling [was not] sufficiently egregious to deny him an otherwise proper remedy"). Cf. *Indian Head Lubricants, Inc.* 261 N.L.R.B. 12 (1982) (reinstatement denied to unlawfully discharged employee whose bribery scheme was a "flagrant and malicious" subversion of a Board election).

[17] Amici Chamber of Commerce *et al.* (Chamber) are thus quite wrong in arguing (Br. 13) that "it would be impossible for ABF or any employer to accept an employee like Manso back into the workplace." It is not uncommon for arbitrators to order reinstatement of an employee who has engaged in deception, when, on balance, that remedy appears appropriate. *Union Carbide Corp.*, 81 Lab. Arb. (BNA) 864 (1983) (White, Arb.) (awarding reinstatement without backpay to employee who gave supervisor false reason to justify use of funeral leave); *George A. Hormel & Co.*, 71 Lab. Arb. (BNA) 1090 (1978) (Wyman, Arb.) (reinstating without backpay employee who proffered false reason for absence from work); *Air Canada*, 66 Lab. Arb. (BNA) 1295 (1976) (O'Shea, Arb.) (reinstating with backpay and suspending for one month employee for fraudulent abuse of sick leave).

1194. Cf. *NLRB* v. *O'Hare-Midway Limousine Service, Inc.*, 924 F.2d 692, 697-698 (7th Cir. 1991) (employer failed to show that it had a safety policy that precluded reinstatement of driver with drunk driving citation); *NLRB* v. *Jacob E. Decker & Sons*, 636 F.2d 129, 131-132 (5th Cir. 1981) (post-discharge felony convictions do not, without more, preclude reinstatement where employer had no policy of automatic discharge of felons). While dishonesty is, of course, a valid basis for discharging an employee, that was not the basis that petitioner invoked for discharging Manso and there is no showing that it is a basis for discharge that petitioner uniformly applies to its employees.

The Board's approach permits it to consider all of those circumstances in determining how to craft a remedy that "will effectuate the policies of th[e] [Act]," 29 U.S.C. 160(c). It permits the Board to neutralize the effects of an unlawful termination through the most effective means where there is no need to subordinate that purpose to the protection of the Board's integrity or the employer's legitimate interests. Petitioner's rigid approach, in contrast, would deny the Board any discretion to consider whether reinstatement with backpay is appropriate once it determines that the employee has lied.

C. The Board's Rule Is Within The Scope Of Its Authority

In arguing that the Board is required to deny make-whole relief to employees who have testified falsely to the Board, petitioner's burden is to establish that such relief constitutes "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. at 540. Petitioner

has not made that difficult showing. Make-whole relief in this context serves the traditional purposes that it has in its other applications by the Board, and no policy expressed in the Act requires a per se rule denying such relief because of the employee's false testimony.

1. Petitioner contends that its rule is necessary "[t]o maintain the integrity of the oath administered at NLRB hearings" (Br. 30), and, more generally, to maintain the "integrity of the [Act] and its adjudicatory system" (Br. 3). The Board, however, has discretion in determining how best to protect its integrity while effectuating the policies of the Act. There is no express provision of the statute requiring denial of relief to a charging party who lies under oath before the Board. Petitioner relies (Br. 10) on Rule 603 of the Federal Rules of Evidence, which requires that a witness shall take an oath to testify truthfully, and the requirement of Section 10(b) of the Act, 29 U.S.C. 160(b), that the Board must follow the rules of evidence applicable in the federal district courts "so far as practicable." But Fed. R. Evid. 603 does not prescribe the consequences for failing to testify truthfully. The National Labor Relations Act "is not a cause of action for perjury; we have other civil and criminal remedies for that." *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2754 (1993) (discussing Title VII of the Civil Rights Act of 1964).

Asserting that reinstatement is an "equitable" remedy, petitioner invokes the equitable maxim that "a man must come into a court of equity with clean hands" (Pet. Br. 13) as a basis for denying relief to employees who commit perjury. The Board, however, is not a court of equity, and is not bound to apply rules developed in other contexts in implementing the

statutory commands of the Act. *Virginia Elec. & Power Co.*, 319 U.S. at 543 (court may not "fetter the Board's discretion by compelling it to observe conventional common law or chancery principles"); *Phelps Dodge Corp.*, 313 U.S. at 188 (Board is not "confined within narrow canons for equitable relief deemed suitable by chancellors"); see also *Shepard* v. *NLRB*, 459 U.S. 344, 351 (1983). Nor is the Board bound to follow the practices of courts and arbitrators addressing other statutes or claims (Pet. Br. 17 n.9, 34-36), even if it were true that such bodies automatically nonsuit a plaintiff who commits perjury—which it is not.[18] Although perjury "has been prohibited since early days of the common law and is a felony," while the unfair labor practice that petitioner committed "was permissible until relatively recently in American history" (Pet. Br. 14), the

[18] In fact, neither courts nor arbitrators follow a reflexive rule. While courts may invoke the sanction of dismissal in the face of deceptive conduct, they are not required to apply the ultimate penalty; this Court has cautioned that "outright dismissal of a lawsuit * * * is a particularly severe sanction." *Chambers* v. *NASCO, Inc.*, 111 S. Ct. 2123, 2133 (1991). And arbitrators typically exhibit the same flexibility displayed by the Board. Arbitrators have held that post-discharge events cannot be invoked to justify the discharge, but rather, "in considering the matters of reinstatement and back pay, account may and should be taken of the employee's actions subsequent to his discharge insofar as they may relate to his fitness for employment and as they bear upon the effect of his reinstatement on plant morale, discipline, efficiency, and the like." *Columbus Show Case Co.*, 44 Lab. Arb. (BNA) 507, 514 (1965) (Kates, Arb.). See also *Southern Bell Telephone & Telegraph Co.*, 25 Lab. Arb. (BNA) 270, 276-277 (1955) (McCoy, Arb.) ("real question" is whether employee's conduct "had been such as to show that he was not a fit person to be reinstated to his job at the end of the strike").

Board's mission is to implement the Act, not to punish common law crimes.

The Board, of course, regards perjury as a serious matter. The usual remedy for perjury or false statements is a prosecution under applicable statutes. See 18 U.S.C. 1621; 18 U.S.C. 1001. When perjury occurs in a Board proceeding, the agency can refer appropriate cases to the Department of Justice to determine whether criminal prosecution is warranted.[19] Petitioner's rule, however, would require asymmetrical penalties for perjury to be meted out in the Board's own proceedings.

If petitioner's approach were accepted, employers would suffer no sanction from the Board if they lied in an effort to avoid an unfair labor practice finding, while employees who engaged in the same misconduct would automatically suffer the severe consequence of losing a make-whole remedy. In a case such as this, in which both the employee and the employer's repre-

[19] See NLRB Casehandling Manual (Part One) § 10054.5 (June 1989). See also *Multimatic Products, Inc.*, 288 N.L.R.B. 1279, 1279 n.2, 1337 & n.77 (1988) (referring allegation of fraud by union); *Feld & Sons, Inc.*, 263 N.L.R.B. 332, 334, 337 (1982) (case of perjury in the interest of the employer referred and prosecuted); *Marine's Memorial Assoc.*, 261 N.L.R.B. 1357, 1369 (1982) (developing facts so that Board could consider referral). Courts have upheld perjury convictions based on false testimony in Board proceedings. See, *e.g.*, *May* v. *United States*, 280 F.2d 555 (6th Cir. 1960); *Wilson* v. *United States*, 352 F.2d 889 (8th Cir. 1965), cert. denied, 383 U.S. 944 (1966); *Keeble* v. *United States*, 347 F.2d 951 (8th Cir.), cert. denied, 382 U.S. 940 (1965); see also *United States* v. *Krause*, 507 F.2d 113 (5th Cir. 1975) (false statement in violation of 18 U.S.C. 1001); *United States* v. *Di Lapi*, 651 F.2d 140 (2d Cir. 1981) (obstruction of justice), cert. denied, 455 U.S. 938 (1982).

sentatives were found to have testified falsely,[20] petitioner's approach (of penalizing the employee in a manner that rewards the employer) would hardly be "a fair and even-handed punishment for vice." *St. Mary's Honor Center*, 113 S. Ct. at 2754. The effect of petitioner's rule would be not only to penalize the employee (and not the employer) who lies, but also to deny to other employees (who are blameless) meaningful assurance that the employer may not engage in discriminatory discharges.

Petitioner contends (Br. 15) that reinstatement of an employee who testifies falsely will send the message to other employees that "perjury pays." In this case, however, Manso did not profit from his false testimony: the Board awarded him a remedy because it found petitioner's stated reason for discharging Manso to be a pretext for unlawful discrimination; Manso's false testimony was entirely irrelevant to that finding. In these circumstances, a failure to reinstate Manso would send the message to other employees that the employer can discharge an employee for discriminatory reasons with impunity.[21]

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[20] Three of petitioner's officials denied warning Manso that petitioner intended to retaliate against him, see note 2, *supra*, but the ALJ rejected that testimony and found that the warnings were made. Pet. App. B46.

[21] Several courts of appeals, "with little discussion" (Pet. Br. 7), appear to have adopted the position that the Board must deny make-whole relief to an employee who lies before the Board. See *Precision Window Mfg., Inc.* v. *NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992) (considering false testimony and threats); *NLRB* v. *Magnusen*, 523 F.2d 643, 646 (9th Cir. 1975) (per curiam); *NLRB* v. *Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964) (dictum); *Iowa Beef Packers, Inc.* v. *NLRB*, 331 F.2d 176, 185 (8th Cir. 1964); cf. *Alumbaugh Coal Corp.* v. *NLRB*, 635 F.2d 1380, 1385-1386 (8th Cir. 1980) (false claim for unemployment compensation). Whether those courts believed that such a rule is needed to maintain the integrity of the Board's processes or to protect employer interests, they did not attempt to justify the stated limitation on the Board's remedial authority under the standard of *Virginia Elec. & Power Co.* v. *NLRB*, *supra*.

2. Petitioner and its amici argue (Pet. Br. 22-26; Chamber of Commerce *et al.* Amici Br. 17-18) that there is no need for the Board to grant make-whole relief for an unlawfully discharged employee who has lied in a Board proceeding, because there are alternative remedies that can eradicate the effects of the unlawful discharge. The Board may permissibly conclude, however, that those alternative remedies, either alone or in combination, are not adequate replacements for make-whole relief. Cease and desist orders, notice-posting, and the prospect of contempt proceedings are prospective in nature and, while they are essential tools for preventing future violations of the Act, they do not ameliorate the particularized harms that flow from the failure to return an unlawfully discharged employee to his or her former job.

Here, for example, Manso was discharged in retaliation for filing grievances and resorting to the Board. If Manso does not regain his job, petitioner will have accomplished its objective of ridding itself of an employee who asserted contractual and statutory rights. Other employees will understand the risks entailed by such an attempt and will be chilled from engaging in similar activity. That an employer may refrain voluntarily from future violations to avoid "being viewed as a labor outlaw" (Pet. Br. 25) will have little significance if its employees have al-

ready been deterred from exercising their statutory rights.

The other remedies suggested by petitioner serve to enhance, rather than replace, make-whole relief. Visitorial clauses in cases involving an unlawful discharge aid the Board in "secur[ing] compliance with backpay and reinstatement orders by [precluding] the refusal of employers to permit access to payroll and other records." *Cherokee Marine Terminal*, 287 N.L.R.B. 1080, 1081 (1988). Expungement orders are part of the Board's effort to make a reinstated employee whole. By removing unlawful disciplinary actions from his permanent record, the Board seeks to free him from the adverse effects of discrimination after being reinstated. *Sterling Sugars, Inc.*, 261 N.L.R.B. 472 (1982). Finally, as petitioner notes (Br. 25-26), the Board assesses litigation expenses against a respondent only where its defenses in the unfair labor practice proceeding were "frivolous." *Heck's, Inc.*, 215 N.L.R.B. 765, 768 (1974).

3. Amici Chamber of Commerce *et al.* argue (Br. 5, 8-9, 13) that it offends national labor policy to require an employer to retain an untruthful employee, because trust is fundamental to the employer-employee relationship. As the Board made clear in its decision here (Pet. App. B18 n.13), an employer is entitled to discharge an employee for dishonesty.[22]

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[22] Section 10(c) precludes the Board from ordering reinstatement or the payment of backpay to any individual who "was suspended or discharged for cause." 29 U.S.C. 160(c). That provision is not a check on the Board's remedial authority once it has found an unfair labor practice, however. As the Court explained in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964):

> An employer who has committed an unfair labor practice by discharging an employee out of anti-union animus, however, is not in the same position as an employer who fires an employee for cause. The Board's authority to remedy the unfair labor practice requires it to consider not only the impact of reinstatement on the employer, but also the impact of the discriminatory firing on the workforce as a whole and the role of reinstatement in removing the threat of retaliation for protected activity.[23]
>
> The Board's policy is not to guarantee reinstatement to an unlawfully discharged employee who has testified falsely; the employer has the right to show that the employee's misconduct renders the employee unfit for further employment or jeopardizes the efficiency of the employer's operations. While that is a
>
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>
> The legislative history of that provision indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct. There is no indication, however, that it was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice.

Id. at 217; see also *NLRB* v. *Transportation Management Corp.*, 462 U.S. at 401 n.6.

[23] In passing, petitioner suggests (Pet. 18-19 n.11) that to compel it to reemploy "someone as undeserving as Mr. Manso is in effect a penalty." While it is true that the Act does not authorize penalties, *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10 (1940), this Court long ago recognized the futility of using labels to analyze particular reinstatement orders designed to counteract unlawful activity. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. at 348. Because the Board permits the employer to avoid reinstatement of an employee who is demonstrably unfit for service, its reinstatement orders cannot be characterized as penal.

heavier burden than the employer bears to justify a discharge for cause, see *Owens Illinois*, 290 N.L.R.B. at 1193 n.5, it is warranted by the fact that, when the employer has initially retaliated against the employee for exercising statutorily protected rights, reinstatement of that employee is presumptively necessary to eradicate the effects of the unfair labor practice on the workforce.[24]

Amicus ATA takes a different tack, contending (Br. 14) that the purposes of the Act "cannot conceivably be advanced by forcing upon the employer a worker whom the employer would have ample grounds to fire because of his post-discharge false testimony against the employer." An employer may not circumvent the Board's remedial authority, however, by arguing that the employee's misconduct during the Board hearing constitutes "cause" for dis-

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[24] As petitioner notes (Br. 17-18), several cases have held that, despite an unfair labor practice, employee misconduct on the job established unfitness for further employment. See *NLRB* v. *Apico Inns of Cal., Inc.*, 512 F.2d 1171, 1173 (9th Cir. 1975) (bartender made profane remarks about his supervisor in front of customers and fellow employees, sexually harassed other employees, made lewd remarks and gestures to customers, and failed to fill drink requests); *NLRB* v. *Commonwealth Foods, Inc.*, 506 F.2d 1065, 1068 (4th Cir. 1974) (employees who admitted stealing from their employer were not entitled to reinstatement); *NLRB* v. *Breitling*, 378 F.2d 663, 664 (10th Cir. 1967) (same); *NLRB* v. *Big Three Welding Equipment Co.*, 359 F.2d 77, 82-84 (5th Cir. 1966) (same). Whether or not those cases are correctly decided on their facts, the Board agrees with the general principle that some forms of misconduct are incompatible with reinstatement; what the Board rejects is the proposition that any misconduct justifies the denial of reinstatement of an employee who has been unlawfully discharged.

charge, after the Board itself has determined that the need to sanction that misconduct is outweighed by the need to remedy the *employer's* unlawful conduct. The employer is not required to retain the reinstated employee forever; "[i]f the reinstated employee does not effectively perform, he may, of course, be discharged for cause." *Golden State Bottling Co.* v. *NLRB*, 414 U.S. at 185. But the employer may not rely on pre-reinstatement conduct as a basis for termination, when the Board has already considered and rejected that ground.[25]

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[25] Petitioner relies (Br. 31-33) on cases decided under Title VII of the Civil Rights Act of 1964 addressing the relevance to a discrimination claim of after-acquired evidence of a lawful basis for dismissal. See *Milligan-Jensen* v. *Michigan Technological University*, 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991 (1993) (No. 92-1214), cert. dismissed pursuant to Sup. Ct. R. 46.1 (Aug. 10, 1993). Those Title VII cases, however, are not relevant to petitioner's claim that a rule barring make-whole relief to charging parties who lie is required to protect the integrity of the Board's processes. As Amicus ATA recognizes (Br. 15 n.4), the policies underlying the Board's remedial powers differ from those at issue in Title VII. Moreover, because petitioner did not contend or establish that it would not have hired, or would have discharged, an employee found to have given false testimony, this case presents no issue as to whether the Board would bar reinstatement when the employer proves that the employee engaged in post-discharge misconduct that would result in the discharge of any similarly situated employee. Compare *Service Garage, Inc.*, 256 N.L.R.B. at 931 (Board has held that "a discriminatee's right to reinstatement and backpay will be forfeited if a respondent affirmatively proves that it would not have hired the employee but for its reliance on application information whose falsity was discovered subsequent to the employee's unlawful discharge"); *John Cueno, Inc.*, 298 N.L.R.B. 856, 856-857 & n.7 (1990) (limiting the denial of backpay to

In sum, petitioner's basic contention is that the Board is always required to deny make-whole relief to an employee who has given false testimony in Board proceedings. As this Court long ago noted, in affirming the Board's discretion in its decisions to award or withhold reinstatement,

> [b]ecause the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

Phelps Dodge Corp., 313 U.S. at 194. In light of that principle, petitioner's request for a blanket rule to govern the Board's remedial discretion in the context here should be rejected.

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the date when the employer discovered the false application information).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 92-1550

In The

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October Term, 1993

ABF FREIGHT SYSTEM, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF

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MISCELLANEOUS

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REPLY BRIEF

In the Brief For the National Labor Relations Board ("NLRB Brief"), Respondent is advocating uncertainty and vagueness on a legal duty that is essential to administration of justice. The NLRB and its amici have disregarded years of circuit court precedent supporting the common sense notion that deliberately false testimony should not be rewarded. On the issue of this case, the NLRB's preference for legal indeterminacy must yield to a firm admonition that deliberately false testimony calculated to affect the outcome of a case will not be condoned.

I.

DEFERENCE TO THE BOARD IS NOT WARRANTED

The NLRB and AFL-CIO argue at length that the Court should defer to the Board to decide when make-whole relief should be given to a discriminatee who lied to an administrative law judge. The Board is entitled to some deference in assessing industrial reality, but the circumstances of this case do not invoke the Board's special expertise. Far from it, as most every circuit court that has confronted the issue has commented, dealing with abuse of process seems to be a subject beyond the realm of NLRB comprehension. *See Precision Window Manufacturing Co. v. NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992) (citations omitted); *NLRB v. Mutual Maintenance Service Co., Inc.*, 632 F.2d 33, 39 (7th Cir. 1980).[1]

A. The Board's Wavering View Over The Years Renders Its Position Less Worthy Of Deference.

"An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). Although several references are made in the NLRB's Brief to "the Board's approach," that reference overstates the precedent. Analysis of NLRB

[1] In *Mutual Maintenance*, the Seventh Circuit refused to enforce an NLRB order that an employer reinstate with backpay an employee who committed unemployment compensation fraud. The court commented:

> The Board's cavalier treatment of this matter, in the face of ample precedent to the contrary, is simply inexcusable.

Id. at 39.

cases over the past many years reveals no approach lest it be an inconsistent one.

A chronological synopsis illustrates the point. First, in 1944 the Board held that "reinstatement would not effectuate the policies of the Act" because of the employee's lack of candor on the witness stand and his poor attendance record. *O'Donnell's Sea Grill*, 55 NLRB 818 (1944). Since the Board found that poor attendance was not the real reason why the employee was discharged, lack of candor is the only reason why the Board denied reinstatement.

Over the ensuing forty-four (44) years, the Board addressed false testimony by a prevailing discriminatee three times. *Iowa Beef Packers*, 144 NLRB 615 (1963), *enf. denied*, 331 F.2d 176 (8th Cir. 1964); *D V. Copying & Printing Inc.*, 240 NLRB 1276 (1979); and *Service Garage, Inc.*, 256 NLRB 931 (1981), *reversed*, 668 F.2d 247 (6th Cir. 1982). Not one of those cases resulted in an award of make-whole relief to a witness who deliberately gave false testimony on an issue in the case. In *IBP*, the Board simply overruled the ALJ's finding that the witness lied; in *D.V. Copying* the Board strongly condemned subornation of perjury by a charging party;[2] and *Service Garage* simply involved false testimony about one's age by a

[2] In *D.V. Copying & Printing Inc.*, 240 NLRB 1276 (1979), the Board was confronted with a prevailing charging party who knew that a witness on his behalf testified untruthfully. This was no grey area for the Board: it stated unequivocally that *suborning perjury* "alone constitutes deliberate and malicious conduct so calculated to abuse and undermine Board processes that the presence of an accompanying threat is unnecessary to toll the discriminatee's right [to backpay and reinstatement] as of the time of such conduct." *Id.* at 1276, n.2, *citing Iowa Beef Packers v. NLRB*, 331 F.2d 176 (8th Cir. 1964).

juvenile witness whose motive was to keep his job with another company.[3]

Finally, there is the Board's decision in *Owens-Illinois, Inc.*, 290 NLRB 1193 (1988), *enf'd without op.*, 872 F.2d 413 (3d Cir. 1989). This is the first time the Board held that false testimony on an issue in the case will not disqualify one from make-whole relief as long as most of the discriminatee's testimony is credited. 290 NLRB at 1193.[4]

The Board's approach becomes even murkier when cases involving falsification during the compliance phase of ULP proceedings and the after-acquired-evidence cases are considered. *American Navigation Co.*, 268 NLRB 426

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[3] The NLRB and AFL-CIO rely heavily on *Service Garage*, but that decision is consistent with denial of relief to Mr. Manso in this case. Had the youth's deception in *Service Garage* applied to an issue in the case, the inference to be drawn from the Board's decision is that back pay and reinstatement would be denied.

[4] Relying on *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S 645, 665-666 (1982), the Board contends that ABF waived the argument that Manso should have been denied relief under "the Board's approach" in *Owens* and *Lear-Siegler* because ABF did not raise that argument before the Board. (NLRB Brief, p. 21, n.14). Section 10(e) of the Act simply requires that objections to an issue be raised before the Board. ABF has objected to giving relief to Manso, because of his lie to the ALJ, at every phase since the hearing in Albuquerque. ABF did not waive application of Board law just because it did not cite the cases the Board likes. Section 10(e) simply requires that a party's exceptions be sufficiently specific to apprise the Board that an issue might be pursued on appeal. *See May Department Stores Company v. NLRB*, 326 U.S. 376, 386 (1945). As long as the issue is preserved for appeal, it is irrelevant that a specific argument relating to that objection is not raised before the Board. *See, e.g., Hospital & Service Employees Union v. NLRB*, 798 F.2d 1245, 1248 (9th Cir. 1986) (particular form of an argument concerning the issue of actual notice could be raised for the first time on appeal).

(1983), which figures prominently in the NRLB and AFL-CIO Briefs, holds that accrual of back pay stops when it is discovered that a discriminatee has willfully concealed interim earnings. The Board stated that "to award full backpay to a claimant who attempts to avert an order issued in the public interest into a scheme for unjustified personal gain *is to reward perfidy.*" *Id.* at 428 (emphasis added).[5] Seven years later, by contrast, the Board went further to hold that all backpay is denied when a discriminatee purposefully conceals interim earnings. *Overseas Motors, Inc.*, 291 NLRB 1086 (1990). Apparently, in the Board's view, perjury of facts relating to the merits can be rewarded, but perjury with regard to interim earnings cannot.

Plainly, the NLRB does not have a consistently held view on the consequences of abuse of process by prevailing discriminatees. The vague rationalization that each case turns on the Board's goal to effectuate the purposes of the Act is too loose to hold its varying decisions together. History rebuts any claim to special expertise the Board may raise on this issue.

B. Courts Have Not Deferred To The Board Where Its View About "Purposes Of The Act" Conflicts With Other Important Public Interests.

Most of the cases decided by the NLRB are strictly labor disputes that can be decided without reference to laws other than the NLRA or policies other than national labor policy. *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177

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[5] ULP cases are bifurcated as to liability and compliance. In contrast to the present case, which has not reached the compliance phase, the discriminatees' abuse of process in *American Navigation* and *Overseas Motors* occurred at the compliance phase after there was a final order granting make-whole relief.

(1941), and *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943), cited repeatedly in the NLRB Brief and AFL-CIO Brief, are good examples. The former case involved reimbursement for employee dues paid to a company created and dominated union, and the latter involved the right not to be denied employment simply because one belongs to a labor union. In neither case was there evidence of conduct by the employer or employee implicating legal duties or public interest additional to or separate from federal labor policy.

Judicial review of NLRB decisions is not solely to assure that the Board follows the Act, it is also to see that other equitable, legal, and policy considerations are properly taken into account. As stated in *NLRB v. Mutual Maintenance Service Co., Inc.*, 632 F.2d 33, 39 (7th Cir. 1990), "the National Labor Relations Act must not be enforced in a vacuum." This Court has often recognized that the NLRA must be applied in harmony with other rights, duties, and interests and that it is a function of the courts to correct the Board when its narrow focus on enforcement of the NLRA is blind to other considerations of law or public policy. (*See* Brief For Petitioner, pp. 26-30). Reinstating Michael Manso with full backpay has negative implications to law and policy beyond securing the right of employees to engage in protected concerted activity and thus deference to the Board is unwarranted.

C. Courts Have Not Deferred To The Board When It Has Acted Contrarily To Circuit Court Precedent.

The NLRB's Brief and those of its amici make an ostrich-like demurrer to the circuit court cases holding that a discriminatee who commits serious abuse of process is not entitled to reinstatement with backpay. (*See*

Brief for Petitioner pp. 15-18). Given that Congress has vested the courts of appeal with power to enforce or deny enforcement of NLRB orders, the Board is without authority to disregard judicial precedent established through review of Board decisions. *See NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987). A logical corollary is that an NLRB decision should not receive deference when it conflicts with a decision of a federal circuit court. As stated by the court in *NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119 (3d Cir. 1984):

> We have made it crystal clear that a Board's decision ignoring our precedents will not be enforced, * * * Congress has entrusted the power and authority to conduct judicial review in this court. That assignment is not a meaningless one; we do not propose to abdicate our responsibility to an administrative agency.

Id. at 128 (citations omitted). *See also NLRB v. HMO Intern.*, 678 F.2d 806, 809 (9th Cir. 1982) (Kennedy, J.). The Board's widely criticized policy of non-acquiescence to federal court precedent is ironic for an agency that has declined to exercise its rule-making authority in preference for setting policy by adjudication.[6]

II.

PETITIONER'S VIEW IS CONSISTENT WITH THE WEIGHT OF PRECEDENT

ABF's position is that backpay and reinstatement should be denied to witnesses found to have deliberately

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[6] The Board's authority to engage in rule-making is codified at 29 U.S.C. § 156.

given false testimony on an issue pertinent to a ULP case. (Brief For Petitioner, p. 3). All the Board and federal court decisions that address this issue, up until *Owens-Illinois, Inc.*, 290 NLRB 1193 (1988), *enf'd. without opinion*, 872 F.2d 413 (3d Cir. 1989), are consistent with ABF's position. In every instance where a prevailing discriminatee deliberately gave false testimony or suborned perjury, in an apparent effort to influence the outcome of the case, make-whole relief was denied.[7]

A. Respondent's Argument That Manso's Lie Is Immaterial Is Disingenuous

Michael Manso testified that he was late for work the day of his discharge because his car broke down and he had to call his wife to get out of bed, pick him up, and take him to work. That was a lie, as found by the ALJ. ABF told Manso he was being fired for tardiness. To say that testimony about the circumstances culminating in one's termination from employment is merely tangential to a ULP case challenging the termination is whimsical.

Michael Manso obviously thought his concocted story was material or he would not have made it up and testified about it. This is not a comparable situation to *Service Garage* where an underage employee lied about his age to avoid losing a job with another employer. No purpose other than to improve his odds of winning could possibly be served by Manso's lie.

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[7] *Iowa Beef Packers v. NLRB*, 331, F.2d 176 (8th Cir. 1964); *NLRB v. Apico Inns*, 512 F.2d 1171 (9th Cir. 1975); *NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975); *Precision Window Manuf. v. NLRB*, 963 F.2d 1105 (8th Cir. 1992); *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181 (7th Cir. 1964); *O'Donnell's Sea Grill*, 55 NLRB 828 (1944).

Respondent and amici AFL-CIO irrationally contend that perjured testimony should be disrgarded if it ultimately does not change the outcome of the case. (NLRB Brief, pp. 21-22; AFL-CIO Brief, pp. 5-9). By that approach, witness dishonesty will be excused by the fortunate coincidence that the ALJ looked to other evidence to support her findings. Counsel for the Board and AFL-CIO make the generous assumption that witnesses, including those with a financial interest in the outcome, know precisely what facts will shape the judge's opinion and which ones will not.[8]

The measure should not be what facts ultimately turn out to be dispositive; rather, it should be whether the false testimony relates to a material issue in the case. When a charging party in a wrongful termination case testifies that he had a valid excuse or justification for the conduct cited by the employer as grounds for termination, as Manso did here, there can be no doubt that the testimony relates to a material issue in the case. (See Brief For The American Trucking Association As Amicus Curiae In Support Of Petitioner, pp. 8-9). As with any bright line there will be a penumbra, but that is far superior to the dim reproval of deliberately false testimony advocated by the NLRB and the AFL-CIO.

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[8] By the standard urged by Respondent and the AFL-CIO, the fact that a witness prevailed on the merits in an unfair labor practice case would necessarily mean that any false testimony given by the witness was not relevant and can be disregarded. The approach urged by Respondent and the AFL-CIO is circular and self-fulfilling.

B. Credited Testimony On Some Points Should Not Be An Offset For Deliberately False Testimony On Another Point.

If Moses was a member of the NLRB, the Ninth Commandment would have been edited to say "thou [generally] must not lie."[9] This comment is admittedly facetious, but so too must be the Board's contention that there should be no repercussions to perjury on a specific issue so long as the witness is credited on most of his testimony. (NLRB Brief, pp. 21-22). When Mr. Manso took the witness stand in Albuquerque, he was obligated to speak "the truth, the whole truth, and nothing but the truth" – not just some of the truth.

From 1944 when the situation was first encountered until 1988, no witness who sought to influence the outcome of a ULP case by false testimony was awarded make-whole relief. The Board may protest that all its decisions on the subject are linked by the common mission of enforcing the purposes of the Act, but reality is that the policy of measuring specific lies against the witnesses' overall testimony was first announced in *Owens-Illinois* late in the 1980s. This new approach by the Board is unaccompanied by meaningful standards and contemplates absurd results. For example, a discriminatee who testifies on one point only, and lies in doing so, would be judged more harshly than another discriminatee who repeats the lie but testifies credibly on other subjects. Measured against his overall testimony, the second witness' lie was less significant than the first witness' lie.

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[9] Exodus 20:16. Respondent presumably objects to this commandment as an undesirable bright line rule.

ABF submits that the Board got it right in *D.V. Copying & Printing Inc.*, 240 NLRB 1276 (1979). There, the Board said unequivocally that suborning perjury "alone constitutes deliberate and malicious conduct so calculated to abuse and undermine Board processes" as to mandate denial of make-whole relief. The Board was not concerned about a bright line then and should not be now.[10]

III.

THE OPTION TO REWARD FALSE TESTIMONY IS NOT NECESSARY TO SERVE PURPOSES OF THE ACT

The NLRB argues that it must be able to award backpay and reinstatement to discriminatees who lie on the witness stand both to deter future violations and to reassure incumbent employees that they are secure in their exercise of Section 7 rights. (NLRB Brief, pp. 29-30). That argument is hard to reconcile with the Board's ambiguous treatment of the false testimony issue over the years. If the only driving forces are deterrence of unfair labor practices and reassurance to employees, the Board

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[10] Another case where the Board correctly expressed intolerance toward overreaching conduct by a charging party is *Lear-Seigler Management Services Corp.*, 306 NLRB 393 (1992). There, the Board refused backpay and reinstatement to a charging party who threatened to report probation violations by a potential witness. ABF points out that "perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice." *See Nix v. Whiteside*, 475 U.S 157, 168 (1986) citing I. W. Burdick, Law of Crime §§ 293, 300, 318-336 (1946). Stated succinctly, if threatening a witness is sufficient reason for denying make-whole relief, and perjury is on par with threatening witnesses, then perjury is also sufficient reason for denying make-whole relief.

would never have withheld make-whole relief from prevailing discriminatees who lied. Besides the logical inconsistency between the Board's stated objectives and its actual practice, the premises underlying the Board's position are erroneous.

A. Reassurance to Incumbent Employees Need Not Be Accomplished Through Reinstatement Of An Employee Who Lied on the Witness Stand.

Both the NLRB and AFL-CIO fear that non-reinstatement of Manso or others like him would send a signal to co-workers that filing a charge with the Board is a high-risk proposition. (NLRB Brief, pp. 29-30; AFL-CIO Brief, p. 16). That concern can easily be addressed. The notice required by the Board as part of its remedial orders in ULP cases can include language explaining why the charging party has not returned to work. The Board could go further and direct the employer to meet with its employees or their representative to explain the circumstances of non-reinstatement. There is no reason why employees need be left to speculate.[11]

Another discrepancy in the Board's argument is timing. Years can pass between termination of an employee, filing of a charge, conducting a hearing, exhausting the administrative review process, appeal to the circuit court, and return to the NLRB Region for the compliance phase. By the time a charge runs its course employees are unlikely to question "why isn't so and so back?" When a charging party is eventually reinstated, the more likely question would be: "who is the new guy?" ABF and the

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[11] Notice posting and related remedies are discussed at pp. 19-26 of the Brief For Petitioner.

unions that have represented its employees for many years have tried to give employees a more effective and expeditious avenue of relief through contractual grievance procedures.

Yet another wrinkle in the Board's argument is the implication of a settlement. Unfair labor practice charges with and without merit are routinely settled by mutual compromise. Reinstatement is by no means a uniform feature of settlement agreements, even when the challenged employment practice was a discharge. When an employment discrimination charge, ULP charge, whistleblower claim, or other variety of wrongful discharge claim is settled without reinstatement, incumbent employees are left to draw the same inference or have the same concerns over which the NLRB now expresses concern.

B. Respondent's Belief That Make Whole Relief Is A Necessary Deterrent Is Unsupported And Myopic

The Board has adequate tools to deter employer unfair labor practices without awarding backpay and reinstatement to interested witnesses who abuse Board processes. (Brief For Petitioner, pp. 19-26). Although it now dismisses these tools as "prospective in nature" (NLRB Brief, p. 29), deterrence is by definition a prospective concept. Neither the NLRB nor its amici have by argument, evidence, or social studies shown that injunctions, notice posting, contempt orders and related remedies are ineffective at deterring commission of unfair labor practices. Conversely, there has been no showing that make-whole relief deters future ULP violations any more effectively than other forms of relief.

C. Respondent Is Incorrect In Arguing That Denial Of Make-Whole Relief To A Witness Who Lies Would Create A Double Standard

On pages 27-28 of the NLRB Brief, the argument is made that employers "suffer no sanction" if their witnesses lie "in an effort to avoid an unfair labor practice finding," but that discriminatees caught lying would be sanctioned if denied make-whole relief. That argument challenges reality.[12]

There are only three possibilities in the NLRB's hypothetical. On the one hand, if an employer representative is found to have lied on an issue relating to liability, the odds are overwhelmingly high that the employer is going to lose and relief consistent with NLRB practices will be assessed. In the unlikely event an ALJ concludes that an employer representative deliberately gave false testimony, but nevertheless determines that the employer did not commit an ULP, no relief can be ordered. There being no violation, there can be no remedy for an unfair labor practice.

The third situation is where findings are made that both the discriminatee and employer representative deliberately gave false testimony and a finding is made that the employer violated the Act.[13] To reiterate, it is just

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[12] ABF points out that culpability for false testimony does not transfer one-to-one between a corporation and an individual. Justice Scalia accurately pointed out in *St. Mary's* that individuals' actions are their own whereas corporations act through numerous individuals. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2754 (1993).

[13] The NLRB strongly and misleadingly argues that witnesses for ABF testified falsely. (NLRB Brief, p. 28). No such finding was made by the ALJ. Manso's lie is clear and undeniable and is a far cry from a judge's decision not to credit witness testimony. Credibility findings take into account faulty memory, confusion, misinterpretation or mistake: all of which occur without willful intent to deceive.

not true that withholding backpay and reinstatement in this context would let the employer off scott free. Significant and varied remedies remain at the Board's disposal. (Brief For Petitioner, pp. 19-26). Whether the dishonest charging party is compensated is irrelevant because, as the Board acknowledges, ULP remedies are not for his or her benefit (NLRB Brief, pp. 12-13).

To paraphrase, both the NLRB and AFL-CIO cite to *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993) in making the oversimplified observation: if employers can lie, why can't employees. (NLRB Brief, pp. 25, 28; AFL-CIO Brief, pp. 17-18). Their resort to *St. Mary's* is curious given the pain the NLRB has taken to downplay the relevance of other cases arising under Title VII. (NLRB Brief, p. 33, n.25). Whether or not Title VII precedent is generally relevant in unfair labor practices under the NLRA, however, *St. Mary's* did not involve a situation analogous to this case.

First, there was no finding in *St. Mary's* that the employer deliberately lied. The factfinder there concluded from circumstantial evidence that the articulated reasons for discharge were not the real reasons, but it did not make the specific and serious finding that the employer lied. 113 S. Ct. at 2748. This is not a technical distinction. *Id.* at 2754.

Second, the issue in *St. Mary's* was *not* the propriety of specific forms of relief, the issue was liability. Specifically, *must* a finding of intentional race discrimination

be made when the employer's stated reason for discharge is not credited? Concluding as the Court did that the answer is "no" does not support the proposition that employers who testify falsely can get away with a misdeed that employees cannot. Had the Court ruled otherwise, consistency would dictate that any time a claimant's testimony is not credited there must be a finding of no liability.

Third, the Board's concern with creating a double standard did not interfere with its prior decisions denying make-whole relief to discriminatees who testified falsely. *See O'Donnell's Sea Grill*, 55 NLRB 818 (1944); *D.V. Copying & Printing Inc.*, 240 NLRB 1276 (1979). Respondent's concern about inequities in treatment of dishonest employees compared to dishonest employers is academic in nature and not the product of a potential discrepancy in the law resulting from the Court's decision in this case. Employers whose testimony is discredited in a ULP case are odds-on bets to lose the case. A situation in which a discredited employer prevails in a ULP case is not unimaginable, but that is not the situation presently before the Court.[14]

IV.

ATTACKING PERJURY THROUGH SEPARATE PROCEEDINGS IS INEFFICIENT AND INEFFECTIVE

Echoing Justice Scalia's comment in *St. Mary's*, Respondent states that the NLRA is not a cause of action for perjury. (NLRB Brief, p. 25). True enough, but the

[14] In making its "double standard" argument, the Board has not cited a single case involving such a scenario. NLRB Brief, pp. 27-28.

analogy does not carry over. In *St. Mary's*, the Respondent was arguing that *liability* should be the consequence of discredited employer testimony. ABF agrees that liability should not automatically follow from testimony that is discredited; however, the point here is simply that one should not affirmatively benefit from an adjudicatory process he abused.

If the consequences of intentionally false testimony is not felt within the proceeding where the testimony was given, the only consequence likely to be felt is metaphysical. ABF has no civil action against Manso. There is no civil remedy for perjury and any claim the company might try would be preempted[15] and the futility of collection would further discourage resort to the courts.[16]

Perjury laws are rarely used to prosecute witnesses who lied in hearings before a federal administrative law judge. Manso has not been prosecuted, the Board did not refer his lie to the Justice Department for prosecution, and Respondent's struggle to cite contemporary examples of perjury prosecutions arising from ULP cases corroborates the inadequacy of this approach to addressing false testimony. None of the instances of NLRB referrals for prosecution involved charging parties or discriminatees who lied in ULP proceedings; and it seems unlikely that the NLRB staff would build a case around a witness' testimony and then turn the witness over to other authorities for perjury prosecution. (NLRB Brief, p. 27, n.19). Not just in the administrative hearing context, but in the

[15] See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Garner v. Teamsters*, 346 U.S. 485, 490-491 (1953).

[16] Any company that tried to sue a charging party for malicious prosecution, abuse of process, or any other civil wrong arising from testimony in an unfair labor practice case would undoubtedly face strenuous opposition from the Board.

justice system as a whole, the crime of perjury has been acknowledged throughout this century to be a largely under-prosecuted offense.[17]

Prevarication may be abundant, but prosecutorial and judicial resources are not. Saddling the criminal justice system with singular responsibility for discouraging misuse of civil and administrative proceedings is highly inefficient and ineffective. There always have been and always will be people willing to lie under oath, and minimizing this flaw in human nature takes alot more than the remote possibility of prosecution.

V.

THE ISSUE IN THIS CASE HAS IMPLICATIONS BEYOND ENFORCEMENT OF THE NLRA

Decisions by this Court have a force and prominence unshared by the work of any other court or agency of government. Whether drafted narrowly or in sweeping terms, holdings and explanations in Supreme Court decisions inevitably are seized upon by lawyers advocating varied propositions in far ranging contexts. Supreme Court decisions are also relied on by judges in state and federal court as precedent and as guidance for resolving policy debates where precedent is lacking or unclear. Further, to a degree not even approximated by any other tribunal, this Court's decisions reach the public and

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[17] *See generally*, Servada, *Accomplices in Federal Court: A Case For Increased Evidentiary Standards*, 100 Yale L.J. 785, 788 (1990); Comment, *Perjury the Forgotten Offense*, 65 J. Crim. L. Criminology 361 (1974), *citing*, Report of the President's Commission on Law Enforcement and Administration of Justice; The Challenge Of Crime In A Free Society 374 (1968); Purrington, *The Frequency of Perjury*, 8 Colum. L. Rev. 67, 70 (1908).

shape our understanding and appreciation of the rule of law.

The Supreme Court's supervisory role over the administration of justice in the federal system does not depend on a statutory mandate. *See McNabb v. United States*, 318 U.S. 332, 341 (1943); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Formulating principles and rules to aid in eliciting the truth and applying the law are basic to the Supreme Court's position at the helm of the Judicial Branch of government. This case presents the Court with an opportunity as supervisor of the federal adjudicatory system to emphasize that correct and consistent application of law depends on a front line where individuals called upon to testify have every conceivable incentive to tell the truth.

Petitioner's final point concerns respect and appreciation. Law is a social contract and effective performance of the contract depends on strong, uniform, unwavering acceptance of its premises. One of those premises, core to application of law, is that witnesses sworn to tell the truth must do so.

Lawyers have been targets of scorn since long before Dick The Butcher's comment in *Henry VI*. Now the distrust is spreading as the litigation system itself suffers widespread public skepticism. A 1991 poll by the National Opinion Research Center, for example, revealed that 27% of adult Americans have "very little confidence" or "no confidence at all" in the courts and the legal system. Only 25% have a "great deal of confidence" (19%) or "complete cofidence" (6%).[18] Litigation abuse and once unfathomable verdicts are a common subject in the news

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[18] National Opinion Research Center, General Social Survey (Nexis, Access No. 0192114, Question 33, October 1991).

media, non-fiction books, popular television and cinema, and everyday conversation. Making Michael Manso a winner despite his attempt to deceive judge and employer would further erode confidence in the legal system. A forceful and unequivocal message that those who avail themselves of the federal adjudicatory system must honor its rules is needed and this case presents a good opportunity to deliver that message.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Brief for Petitioner, ABF Freight System, Inc. respectfully requests that the decision of the Tenth Circuit not be enforced.

Respectfully submitted,

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No. 92-1550

In the Supreme Court of the United States

OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND TRUCKING MANAGEMENT, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND TRUCKING MANAGEMENT, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America (the "Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local Chambers of Commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States, and the single largest association of employers in the

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[1] This brief is filed with the written consent of all parties as provided in Rule 37.3 of the Rules of the Supreme Court of the United States. Copies of those consents are on file with the Clerk of the Court.

country. A significant aspect of the Chamber's activities involves the representation of the interests of its members in employment and labor relations matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations cases coming before the Court.[2]

Trucking Management, Inc. ("TMI") is a multi-employer association which serves as the collective bargaining agent for most of the unionized motor carrier industry in its dealings with the International Brotherhood of Teamsters. Petitioner, ABF Freight System, Inc. ("ABF"), is a long standing member. TMI's 26 members include some of the largest as well as some of the smallest companies in the trucking industry, employing from five to as many as 20,000 employees. TMI's exclusive function is to negotiate and administer the National Master Freight Agreement and its supplemental agreements ("NMFA"), that govern the terms and conditions of employment for approximately 200,000 Teamster-represented employees. The NMFA governed the employment of Michael Manso, the individual whose discharge was the subject of the underlying National Labor Relations Board (the "NLRB" or "Board") proceeding.

The Chamber and TMI have a significant and immediate concern with the propriety of the Board's reinstatement order and the decision of the Court of

[2] *E.g., District of Columbia v. Greater Washington Board of Trade,* —— U.S. ——, 113 S. Ct. 580 (1992); *Lechmere v. N.L.R.B.,* —— U.S. ——, 112 S. Ct. 841 (1992).

Appeals to enforce the order. *Miera v. N.L.R.B.*, 982 F.2d 441 (10th Cir. 1992). The Tenth Circuit and the Board apparently believe that it furthers the purposes and policies of the National Labor Relations Act (the "Act" or "NLRA") to order reinstatement even in egregious cases like this one where the employee lied first to his employer, then to a grievance committee, and finally under oath to an administrative law judge. As the representatives of employers throughout the country, the *Amici* strongly disagree with that position.

Therefore, the Chamber and TMI file this brief in support of the Petitioner in order to assist the Court in its consideration of the issues in this case.

STATEMENT OF THE CASE

Michael Manso was employed as a casual dock worker at ABF's Albuquerque, New Mexico terminal from April, 1987 until his discharge in August, 1989. During his employment, he was a member of Teamsters Local Union No. 492, and worked under the terms of the NMFA and the NMFA's Western States Area Supplement.

Manso was discharged twice by ABF in 1989. The first time, he was terminated for not being available when called to work, as is required under the NMFA. He was reinstated without backpay after filing a grievance and successfully persuading a joint grievance committee that his failure to respond to ABF's telephone call was the result of a malfunctioning phone. Not long after being reinstated, Manso was discharged again on August 17, 1989, this time for recurring tardiness. When questioned by his super-

visors about the reason for his tardiness, Manso claimed to have had car trouble. He told his employer that he had been assisted by an officer of the local sheriff's department, who Manso identified by name. ABF investigated the incident, and concluded from the police that Manso's story was not legitimate. He then was discharged.

Manso filed another grievance under the NMFA, but ABF presented compelling evidence to the joint grievance committee that Manso had lied about the reason for his tardiness. Manso then filed an unfair labor practice charge with the NLRB. During the Board hearing, Manso repeated his story, this time under oath before an administrative law judge, about his car trouble on the way to work the morning of his discharge. He also testified about being assisted by the police. At the hearing, however, ABF produced the police officer Manso claimed had assisted him. The officer testified that he had stopped Manso for speeding on August 17 at a time long after he should have been at work, and said that there was nothing wrong with Manso's car. In light of the officer's testimony, the NLRB judge refused to reinstate Manso because he had lied to his employer and in his testimony to the Board. The judge stated unequivocally in his written decision: "Manso was lying." On review, however, the NLRB set aside this aspect of the judge's decision, concluding that ABF had violated Sections 8(a)(3) and (4) of the NLRA, 29 U.S.C. §§ 158(a)(3) and (4) (1988), by discharging Manso, and ordered him reinstated with back pay. The Tenth Circuit Court of Appeals enforced the Board's order.

SUMMARY OF ARGUMENT

The NLRB has authority to grant or deny reinstatement in order to remedy unfair labor practices by employers where doing so will "effectuate the policies" of the Act. 29 U.S.C. § 160(c) (1988). Although reinstatement with backpay has been a traditional make-whole remedy, it is well established that certain employee misconduct will forfeit an employee's right to reinstatement. The facts in this case present the Court with the relatively narrow issue regarding the propriety of reinstatement where an employee engages in egregious and dishonest misconduct. The Chamber and TMI believe that an employee, like Manso, whose pattern of dishonesty includes deliberately lying under oath to an NLRB judge, proves himself so untrustworthy that an employer should not be required to accept his reinstatement.

Employers must—above all else—be able to trust their employees and must be able to refuse to employ those individuals whose honesty and integrity cannot be trusted. Employers place their property, goodwill, customers, indeed the very future of their business, in the hands of their employees every day. An employee whose untruthful testimony concerning his employment relationship prompts a neutral factfinder to unequivocally declare that the employee has lied under oath in a federal proceeding should not be eligible for reinstatement. If the Court adopts the position that employers are required to take back employees who engage in this degree of dishonesty, it will substantially weaken the fundamental underpinnings of the employer-employee relationship and severely undermine this country's labor policy.

Most circuits have recognized that the purposes of the Act are not served by requiring an employer to reinstate an untrustworthy employee. Specifically, the Eighth Circuit's recent decision in *Precision Window Mfg., Inc. v. N.L.R.B.*, 963 F.2d 1105 (8th Cir. 1992), strikes the proper balance between protecting employees' rights under the Act and avoiding the untenable situation created by reinstating a dishonest employee. The court in that case appropriately held that employees forfeit their right to a reinstatement remedy when they testify untruthfully during an NLRB hearing.

Although this Court affords the NLRB considerable discretion in determining whether to reinstate employees, the Board's decision to order reinstatement in this case was arbitrary and without any reasonable basis. The Board's reinstatement order ignores the deleterious effect that lying to an NLRB judge, like other types of employee dishonesty, has on the employment relationship and the Board's processes. Additionally, the Board's current position improperly conveys the message that lying and dishonesty are permissible. This result is especially unnecessary given the alternative remedies that the Board has available to cure statutory violations.

ARGUMENT

I. REINSTATEMENT OF AN EMPLOYEE WHO INTENTIONALLY AND DEMONSTRABLY LIES TO THE NLRB DOES NOT EFFECTUATE THE POLICIES OF THE NLRA

The Act sets forth a comprehensive regulatory framework which governs the relationship between employers, employees and labor organizations covered by the Act. 29 U.S.C. § 151 *et seq.* (1988). As part of this framework, employers are prohibited under Sections 8(a)(3) and (4) of the Act from discriminating against employees because of their union activities, or for filing unfair labor practice charges or giving testimony in an NLRB proceeding. 29 U.S.C. §§ 158(a)(3) and (4). To ensure compliance with the Act, Congress, in Section 10(c), granted the NLRB authority to issue cease and desist orders, "and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . .," which includes promoting labor harmony and stability in the workplace. 29 U.S.C. § 160(c).

Although reinstatement with backpay has been the traditional make-whole remedy for employees who have been discriminated against, it is equally well established that certain misconduct causes the forfeiture of that remedy. *See N.L.R.B. v. Local 1229, I.B.E.W.*, 346 U.S. 464 (1953); *Precision Window Mfg., Inc.*, 963 F.2d 1105 (8th Cir. 1992); *N.L.R.B. v. Commonwealth Foods, Inc.*, 506 F.2d 1065 (4th Cir. 1974).

This case presents the important question of whether it "effectuate[s] the policies" of the NLRA to reinstate an employee, like Manso, whose egregious

behavior includes intentionally and demonstrably lying under oath to a judge during an NLRB hearing. Indeed, the facts of this case present the Court with an unusual situation at the most egregious end of the spectrum. Here, after lying to his employer and to the grievance committee, Manso purposefully lied to an NLRB judge and, based on the uncontroverted evidence presented at the hearing, the judge concluded that Manso had lied. This is not a case of disputed credibility or questionable testimony. *See, e.g., Service Garage, Inc.*, 256 N.L.R.B. 931, 935 (1981), *enforcement denied on other grounds*, 668 F.2d 247 (6th Cir. 1982). Nor is this a case where the employee's dishonesty involved an insignificant or immaterial fact, or where the employer provoked the employee's misconduct. *See, e.g., N.L.R.B. v. Vought Corp.*, 788 F.2d 1378, 1384 (8th Cir. 1986). This case involves an employee whose intentional dishonesty about a material issue in the case prompted an NLRB judge to take the unusual step of unequivocally declaring: "Manso was lying." *ABF Freight System, Inc.*, 304 N.L.R.B. 585, 600 (1991). The Chamber and TMI submit that such conduct so undermines the essential trust forming the foundation of the employment relationship that reinstatement is made untenable.

In this case, we are "not dealing with mere abstract rights, but with an employment relationship." *N.L.R.B. v. Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964). Trustworthiness, honesty, and loyalty are the underpinnings of that relationship. No employer should be required to operate his business, particularly in this day and age of increased international competition, preoccupied with lingering

questions about the trustworthiness of its employees. As this Court has previously pointed out, "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer." *N.L.R.B. v. Local 1229, I.B.E.W.*, 346 U.S. at 472.

The *Amici* are not advocating "pollyanna standards for the conduct of workingmen but merely those that are not incompatible with the normal employee-employer relationship." *National Furniture Mfg. Co.*, 134 N.L.R.B. 834, 859 (1961) (trial examiner's decision not adopted by the NLRB), *enforcement denied in relevant part*, 315 F.2d 280 (7th Cir. 1963). Indeed, unlike the NLRB and the Tenth Circuit, most other circuits understand that the standards of employee conduct do not permit intentional lying, and thus have refused to enforce Board orders that require reinstatement of employees who testify untruthfully.

In *Iowa Beef Packers, Inc. v. N.L.R.B.*, 331 F.2d 176, 185 (8th Cir. 1964), for example, a Board trial examiner found an employer in violation of Section 8(a)(4) of the Act, 29 U.S.C. § 158(a)(4), but nevertheless refused to order reinstatement of the employee because he had testified falsely at the administrative hearing. Despite the employee's lying, the NLRB overruled the trial examiner and ordered the employee returned to work. In the Board's view, the employee's conduct was not "deliberate and malicious" enough to warrant forfeiture of the reinstatement remedy. *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 622-623 (1963). The Eighth Circuit denied enforcement of the Board's reinstatement order, concluding that because the employee gave false testimony at the hearing, "forfeiture of [his reinstate-

ment] remedy [was] required to serve the policy of the Act . . . ." 331 F.2d at 185. *See also Alumbaugh Coal Corp. v. N.L.R.B.*, 635 F.2d 1380, 1386 (8th Cir. 1980) (policies of NLRA are not served by granting reinstatement to "an employee whose dishonesty has been established and whose untruthful testimony abused the process he now claims should grant him full relief.").

Other courts of appeals similarly have acknowledged that requiring reinstatement of an employee who cannot be trusted gives rise to an incongruous and unworkable situation. The Fifth Circuit, for example, concluded that reinstating untrustworthy employees only serves as "an *invitation* to continue such misconduct on the part of the reinstated employees as well as others." *N.L.R.B. v. Big Three Welding Equipment Co.*, 359 F.2d 77, 84 (5th Cir. 1966). In the court's view, the reinstatement of employees who engage in misconduct necessarily results in serious tension and ill will between the employer and the employee. *Id.* The Ninth Circuit likewise has unequivocally stated that reinstating an employee who lies on the witness stand does not effectuate the policies of the NLRA.[3] *N.L.R.B. v. Magnusen*, 523

[3] Arbitrators, who are charged with applying the "law of the shop," similarly have had little difficulty appreciating the harm visited upon both the process and the employer by requiring the reinstatement of a dishonest employee. *See, e.g., Michigan Department of Corrections*, 97 Lab. Arb. (BNA) 286, 290 (Knott, 1991) ("Deliberate falsification goes to the heart of the employment relationship because dishonesty establishes that relationship on a false premise."); *Washington Metropolitan Area Transit Authority*, 84 Lab. Arb. (BNA) 292, 295 (Tharp, 1985) ("There can be no question that lying under oath or lying to an employer certainly involves moral turpitude."). Given arbitrators unique understanding of the

F.2d 643 (9th Cir. 1975). *See also Oil, Chemical & Atomic Workers Int'l Union v. N.L.R.B.*, 547 F.2d 575, 593 n.19 (D.C. Cir. 1976) (employer "should not be forced to live with hostile employees" who attempted to manufacture evidence against it); *N.L.R.B. v. Coca-Cola Bottling Co.*, 333 F.2d at 185 ("to force [the employee] upon the Company under such circumstances would bring about an impossible situation"); *N.L.R.B. v. National Furniture Mfg. Co.*, 315 F.2d 280, 287 n.7 (7th Cir. 1963) ("difficult for us to judicially enforce a renewal of a relationship that bids ill for all concerned."). *Cf. N.L.R.B. v. Apico Inns of California, Inc.*, 512 F.2d 1171, 1176 (9th Cir. 1975).

The Chamber and TMI submit that the recent decision of the Eighth Circuit in *Precision Window Mfg., Inc. v. N.L.R.B.*, 963 F.2d 1105, strikes the appropriate balance between protecting employees' rights under the Act and avoiding the untenable situation of requiring employers to reinstate individuals they cannot trust. In *Precision Window*, the court refused to enforce a Board order reinstating an employee who initially testified dishonestly before an administrative law judge, but who subsequently was "hammered into telling the truth." *Id.* at 1110. The court held:

> This court refuses to take the Board's processes as lightly as the Board apparently does. An employee may sacrifice his right to reinstatement by engaging in dishonest or fraudulent activity following his termination. *Alumbaugh Coal*

workplace, courts traditionally have afforded great deference to their decisions. *See United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987).

> *Corp. v. N.L.R.B.*, 635 F.2d at 1386. '[T]he purposes and policies of the Act do not justify full reinstatement of an employee whose dishonesty has been established and whose untruthful testimony abused the process he now claims should grant him full relief.' *Id. Specifically, an employee forfeits his reinstatement remedy when he purposefully testifies falsely during an administrative hearing.*

Id. (citations omitted and emphasis added).

Significantly, the Tenth Circuit attempted to distinguish the decision in *Precision Window*, pointing out that Manso initially lied not to the judge, but to his employer, and lied only about facts that were not relevant to his termination. *Miera v. N.L.R.B.*, 982 F.2d at 447. This analysis fails. Surely, the Tenth Circuit is not saying that lying to a judge is permissible so long as the employee lies to his employer first. Furthermore, to the extent the court's view is that reinstatement should be denied only when the employee's untruthfulness is "highly relevant to determining" the unfair labor practice charge, that position must be rejected.[4] *Precision Window Mfg.*,

[4] The Tenth Circuit completely ignores the fact that Manso also lied in his testimony before the judge, the very conduct which prompted the Eighth Circuit to deny reinstatement in *Precision Window Mfg., Inc.*, 963 F.2d at 1110. Additionally, Manso's false testimony was not only relevant to determining the basis for his discharge, it provided the foundation for the judge's conclusion that his discharge did not violate the Act: "Accordingly, I must conclude that Manso was lying to the Respondent when he reported that his car had overheated and that he was late for work because of car trouble. In light of this conclusion, I must further find that the Respondent discharged Michael Manso on August 17 for cause . . . ." *ABF Freight System, Inc.*, 304 N.L.R.B. at 600.

Inc., 963 F.2d at 1109. Lying under oath to a judge is wrong, regardless of whether it involves facts that are "highly relevant" as opposed to facts that are merely "relevant" to the proceeding. As one court aptly pointed out, "[i]f truth is diluted, it is no longer truth." *Allis-Chalmers Mfg. Co. v. N.L.R.B.*, 261 F.2d 613, 616 (7th Cir. 1958). Neither a court nor the NLRB serves its own purposes by permitting some amount of lying, or by adopting a standard that allows some dishonesty depending on its degree of relevance. Thus, reinstatement should be denied to any employee, like Manso, who intentionally and demonstrably lies under oath to an NLRB judge during an administrative hearing concerning his employment.

Manso's pattern of dishonesty and untruthfulness is precisely the conduct courts have recognized as undermining the essential trust that is at the heart of the employer-employee relationship. Manso demonstrated disdain for his employer and his collectively-bargained grievance procedure by intentionally lying to both. He then lied under oath to the NLRB judge about a material fact related to his unfair labor practice charge. Although it would be naive to suggest that Manso is the first person to testify untruthfully in an administrative hearing, it is significant that Manso's overt contempt for the Board process and the Act it implements prompted the judge to take the uncommon step of stating in his written decision that Manso had lied. Under these circumstances, it would be impossible for ABF or any employer to accept an employee like Manso back into the workplace. It certainly does not effectuate the purposes or policies of the Act to require any employer to do so.

II. THE NLRB'S REINSTATEMENT OF MANSO IS AN ABUSE OF ITS DISCRETION

Although the NLRB enjoys considerable latitude in determining whether an employee's reinstatement effectuates the purposes and policies of the Act, that discretion is not unlimited. In deciding whether to order reinstatement, the Board may not act arbitrarily, unreasonably or capriciously. *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). *See also N.L.R.B. v. Preterm, Inc.*, 784 F.2d 426 (1st Cir. 1986). The Board's choice here of where to draw the line between conduct that undermines both the Board's processes and the employer's workplace, and that which does not, was arbitrary and without any reasonable basis.

The NLRB apparently believes that a forfeiture of reinstatement is required only where the abuse of its processes has been "malicious." *See* Brief for the National Labor Relations Board in Opposition to Petition for Certiorari [NLRB Opposition] at 13. *See also Service Garage, Inc.*, 256 N.L.R.B. 931; *Owens Illinois, Inc.*, 290 N.L.R.B. 1193 (1988), *enforced without opinion*, 872 F.2d 413 (3d Cir. 1989). The Board claims that in analyzing the appropriateness of denying reinstatement, it examines, *inter alia*, (1) whether the administrative law judge credited the employee's testimony regarding the Act's alleged violation; (2) whether the employee's testimony was generally truthful; and (3) "whether the employer demonstrated that the employee was unfit for further employment." NLRB Opposition at 13.[5]

[5] The NLRB unfortunately did not apply this test to determine whether Manso's reinstatement was warranted. Had the Board done so, it would have found reinstatement inappropriate. First, as previously noted, the administrative law judge concluded that Manso's untruthful statements were the reason for his discharge. Moreover, although the judge may have credited Manso's testimony in other respects, it is apparent that the judge did not consider Manso to be a trustworthy witness. *ABF Freight System, Inc.*, 304 N.L.R.B. at 600. Finally, ABF demonstrated that Manso had lied on three occasions: to the company, to the grievance committee, and to the judge. Even assuming *arguendo* that Manso may have lied originally to protect his job, he certainly had no basis for lying to the judge given the Board's theory of the statutory violation. Manso's decision to compound his original lie on two occasions, especially before the Board, clearly demonstrates his lack of fitness for further employment.

Interestingly, the impact of requiring the reinstatement of a dishonest employee has not been completely lost on the NLRB. Indeed, the Board has recognized that the employer-employee relationship "requires mutual trust," and that disloyalty by an employee precludes reinstatement because it destroys that trust. *Studio S.J.T., Ltd.*, 277 N.L.R.B. 1189, 1201 (1985). *See also Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1629 (1956). The Board also has denied reinstatement in cases where employees have been untruthful on their resumes or applications for employment. *See, e.g., W. Kelly Gregory, Inc.*, 207 N.L.R.B. 654 (1973); *Southern Airways Co.*, 124 N.L.R.B. 749 (1959), *modified*, 290 F.2d 519 (5th Cir. 1961).

Although the Board on occasion has recognized the harmful effect dishonesty and disloyalty can have on the employer-employee relationship, it refuses to acknowledge that uncontroverted lying to one of its own judges is equally damaging to that relationship. *See Lear-Seigler Management Service Corp.*, 306 N.L.R.B. No. 84, slip op. at 5 n.6 (1992) (subornation of perjury alone insufficient to deny reinstatement to an

employee); *Service Garage, Inc.*, 256 N.L.R.B. at 935 (deliberate and willful lying insufficient to preclude reinstatement because conduct did not amount to "malicious abuse of the Board's processes"). Fortunately, most courts of appeals have not hesitated to confront the NLRB over its reinstatement standard.[6] *See, e.g., N.L.R.B. v. Mutual Maintenance Service Co.*, 632 F.2d 33 (7th Cir. 1980).

Under the Board's standard, lying to support an unfair labor practice charge, although not condoned, does not require a forfeiture of the reinstatement remedy. In essence, the Board is telling employees that some lying to its judges is permissible. Even in this case, where the untruthful testimony elicited an unsolicited conclusion by the judge that the employee had lied, the Board paid only passing lip service to Manso's untruthfulness, stating: "We, of course, do not suggest that giving dishonest excuses for lateness cannot be a legitimate ground for discharge or other disciplinary action." *ABF Freight System, Inc.*, 304 N.L.R.B. at 590 n.13. The Board gave no indication that it considered whether Manso's

[6] Indeed, federal appeals courts have regularly denied enforcement of Board reinstatement orders where there has been employee misconduct undermining the employer-employee relationship. *See, e.g., Holiday Inn of America of San Bernardino*, 212 N.L.R.B. 280 (1974), *enforcement denied in relevant part, N.L.R.B. v. Apico Inns of California, Inc.*, 512 F.2d 1171 (9th Cir. 1975) ("reprehensible" and "egregious" conduct, including lewdness toward co-employees and customers and sexual harassment of co-employees); *Breitling Bros. Construction Co.*, 153 N.L.R.B. 685 (1965), *remanded in relevant part*, 378 F.2d 663 (10th Cir. 1967) (theft); *R.C. Can Co.*, 144 N.L.R.B. 210 (1963), *enforcement denied in relevant part*, 340 F.2d 433 (5th Cir. 1965) (employee threatened company president with bodily harm).

reinstatement would affect the integrity of its own processes or the employment relationship. This Court should categorically refuse "to take the Board's processes as lightly as the Board apparently does." *Precision Window Mfg., Inc.*, 963 F.2d at 1110.

Moreover, the Board's reinstatement of Manso simply sends the wrong message to employees. It places the Board's imprimatur on dishonesty in the workplace. Rather than telling employees that they can lie about certain matters, but not others, the Board should be reinforcing the message that any lying and dishonesty before administrative tribunals will not be tolerated. Such conduct should be viewed as an independent wrong for which the employee must assume the consequences, *i.e.*, forfeiture of the reinstatement remedy. *Alumbaugh Coal Corp.*, 635 F.2d at 1385. *See also Mutual Maintenance Service Co.*, 632 F.2d at 39 (employee who engaged in scheme to illegally obtain employment benefits not eligible for reinstatement despite fact that employer was "aware of and even encouraged" fraudulent action). This approach comports with both the specific purpose and policy of the Act,[7] and also with "the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act . . . ." *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 42 (1987).

The Board's refusal to adopt the position that an employee forfeits reinstatement by purposefully and demonstrably testifying untruthfully is especially

[7] Section 1(a) of the Act states that in their relations with one another, employers, unions and employees have no right "to engage in acts or practices which jeopardize the public health, safety, or interest." 29 U.S.C. § 151(a).

troubling because the NLRB has alternative remedies it can use to cure statutory violations. The Board's order requiring ABF to cease and desist from the conduct which gave rise to these violations would remain in effect, separate and apart from a reinstatement order. The Board's requirement that ABF post a notice signed by one of its authorized representatives and acknowledging the employer's intent to comply with the statute also is an effective remedy, and prevents similar misconduct in the future. Finally, the NLRB could order backpay until, for example, the time that the employee abused the Board's processes. Accordingly, a directive from this Court to the Board finding reinstatement inappropriate in cases such as this one will not undermine the Board's ability to "effectuate the policies" of the Act nor allow the statutory violations which occurred here to go unremedied.

CONCLUSION

The NLRB's reinstatement of Manso neither effectuates the policies of the NLRA nor comports with the realities of the workplace. The Board's reinstatement order demonstrates a lack of concern by the Board for its own processes and the employer-employee relationship. Manso has shown a pattern of dishonesty with his employer, the grievance committee and an NLRB judge. Manso's disdain for the truth requires that reinstatement be denied under the facts of this case. No employer should have to trust its future to an employee like Manso. Accordingly, this case should be remanded to the Court of Appeals with instructions to deny enforcement of that portion of the Board's order directing ABF to reinstate Michael Manso.

Respectfully submitted,

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August 18, 1993

No. 92-1550

In the Supreme Court of the United States

OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The amicus curiae will address the following question:

Whether an order to reinstate with backpay an employee determined by an Administrative Law Judge to have testified falsely as to a material issue during an unfair labor practice hearing exceeded the National Labor Relations Board's statutory authority.

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Trucking Associations, Inc. ("ATA"), a not-for-profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 for-hire motor carriers, as well as private carriers, leasing companies, and trucking suppliers. Nationwide, the trucking industry employs approximately 7,800,000 men and women. ATA regularly advocates the trucking industry's common interests before this Court and other courts.[1]

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[1] The written consents of the parties to the filing of this brief have been filed with the Clerk.

As participants in the National Labor Relations Board's adjudicative processes, ATA's members have a strong interest in the integrity and reliability of Board decisionmaking. This case raises particular concerns for ATA and its membership. The Tenth Circuit enforced an NLRB order that will have the effect of encouraging employees to perjure themselves in unfair labor practice hearings to increase their chances of a favorable ruling.

ATA believes that just and reliable adjudication of disputes between employers and employees, which is the cornerstone of labor relations under the National Labor Relations Act (the "Act" or "NLRA"), requires that those who abuse the Board's unfair labor practice proceedings by lying as to material issues should forfeit remedies that would award them personal benefits, such as reinstatement and backpay. Only in that way can employers have reasonable assurance that the deck is not stacked against them in unfair labor practice proceedings by perjured testimony encouraged by the Board's remedial practices. ATA therefore believes that the court of appeals' decision should be reversed.

STATEMENT

1. Petitioner ABF Freight System, Inc., an interstate trucking company, employed Michael Manso as a dockworker at its terminal in Albuquerque, New Mexico. Manso was a "preferential casual" dockworker, and as such had limited rights under a collective bargaining agreement between ABF and the International Brotherhood of Teamsters Local 492 (the "Union"). Pet. App. A7-A8.

In 1988, pursuant to its interpretation of the labor contract, ABF discharged Manso and other preferential casual workers, but offered them reinstatement as dockworkers if they would waive preferential casual status. The Union filed a grievance, and Manso filed an unfair labor practice charge. A third-stage grievance panel ordered ABF to reinstate the discharged dockworkers as preferential casuals without backpay; ABF complied. Pet. App. A8; B9-

B10; B14[2]. After Manso returned to work in April 1989, ABF supervisors told him that he should be careful because the company "was after him." *Id.* at B46.

In June 1989, ABF discharged Manso under its disciplinary policy for twice failing to respond to a telephone call summoning him to work. Pet. App. B15. Manso filed a grievance. There was evidence at the grievance hearing that on the second occasion when Manso did not answer a work call, the employee who placed the call believed he might have misdialed, but had been denied permission to redial by a supervisor. On the basis of the supervisors' warnings to Manso and the refusal to allow the second work call to be redialed, the grievance panel found the discharge of Manso to be in violation of contract and ordered ABF to reinstate him without backpay. *Id.* at A9; B15; B47.

2. On August 11, 1989, Manso arrived late for work and was given a disciplinary warning letter. Pet. App. B16; B47. The employee classification of "preferential casuals" was a new one, and this was the first occasion on which a preferential casual had been late to work; thus, after consultation, ABF managers formulated a tardiness policy for this group of employees. The policy provided that a first unexcused tardiness would result in a disciplinary warning letter; a second would result in termination. *Id.* at B17.

A few days later, on August 17, Manso again arrived at work late. Questioned by his supervisors about why he was late, Manso claimed that his car had broken down on the freeway on the way to work. He walked to a pay phone and called the ABF terminal, and then his wife. His wife picked him up in her car. Manso asserted that he then drove with his wife towards the terminal, leaving his own car on the side of the freeway. On the way to the

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[2] The Board subsequently held, in an action consolidated with the present one, that ABF's termination of preferential casuals had been pursuant to a reasonable interpretation of the contract and had not violated the NLRA. Pet. App. A12-A13; B13.

terminal, he was pulled over for speeding by Bernalillo County deputy sheriff Smith. Pet. App. B16; B47-B48; ALJ Tr. 126-130. When asked what time he had left home, Manso became evasive and refused to answer. Pet. App. B48.[3]

ABF supervisors attempted to verify Manso's story. The plant manager drove to the spot on the freeway where Manso claimed to have left his car; it was not there. Supervisors also spoke to Officer Smith. They concluded that Manso's explanation was false and his tardiness unexcused. The company then discharged Manso. Pet. App. B48; ALJ Tr. 451-454.

3. Manso filed a grievance contesting his discharge and repeated his "excuse" at the first-step grievance hearing. After Manso's termination was upheld, he filed an unfair labor practice charge against ABF. Pet. App. A10.

At the hearing before the Administrative Law Judge, Manso retold — this time under oath — his story that his August 17th tardiness had been caused by car trouble. Manso told the ALJ that on his way to work that morning his car overheated and "got so hot it stopped." ALJ Tr. 129. Manso "just left [his car] on the side of the road." *Id.* at 134. He "walked to the nearest pay phone," "talked to ABF," then "called [his] wife." She "came and picked [him] up from the pay phone [he] was at." *Id.* at 127. When his wife arrived, "[s]he got in the passenger side; [Manso] drove the car to work." *Id.* at 134; see also *id.* at 505. On the

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[3] This account of what Manso told his supervisors is drawn from the ALJ's opinion and is based upon Manso's own account of events. ABF supervisor Ed Fultz recalled that Manso had given his supervisors a somewhat different version of this story, one that included no mention that he had been stopped for speeding. According to Fultz, Manso had said that after the breakdown, Officer Smith stopped to offer his assistance but Manso refused it. ALJ Tr. 447-448. This is the explanation set out in the Employee Discussion Report that ABF personnel prepared at the time of the incident. *Id.* at 447.

way, Manso was pulled over for speeding by Officer Smith. *Id.* at 128-130.

Officer Smith contradicted Manso's story. Smith testified that he had followed Manso for two or three miles, at speeds of 85 to 90 miles an hour, then stopped him for speeding. ALJ Tr. 511. When he did so, "[t]here was no woman in the car" with Manso; "[h]e was by himself." The only excuse Manso gave Smith for speeding was that "he was late for work." *Id.* at 513. Manso did not tell Officer Smith about any car trouble. *Id.* at 512.

The ALJ credited Smith's testimony. He concluded that Manso had been "lying to [ABF] when he reported that his car had overheated and that he was late for work because of car trouble" — precisely the explanation Manso had repeated to the ALJ under oath. The ALJ ruled that ABF fired Manso because "there had been an element of dishonesty in Manso's entire course of conduct in this matter." ABF had thus discharged Manso for cause, not in reprisal for filing an unfair labor practice charge and a grievance following his earlier dismissals. Pet. App. B58-B59.

4. The NLRB reversed. The Board first determined that ABF had not "treated Manso's dishonesty in and of it itself as an independent basis for discharge." Pet. App. B18. Rather, Manso's lie established "that he did not have a legitimate excuse for the August 17 lateness." at B16. It was this second unexcused tardiness, rather than Manso's dishonesty, that ABF cited when it fired him. *Id.* at B18.

The Board then found that ABF had treated Manso discriminatorily when it applied its new lateness policy retroactively to his August 11 tardiness. *Id.* at B20. It concluded that the General Counsel had made a prima facie case that ABF discriminated against Manso in this way in order to retaliate against him for bringing an unfair labor practice charge and a grievance; and that ABF had not met its burden of proof (under the standard for mixed motive cases established in *Wright Line*, 251 NLRB 1083 (1980), enforcement granted, 662 F.2d 899 (1st Cir. 1981)) to show that the company would have discharged Manso for tardiness even if

Manso had not engaged in activities protected by the Act. The Board ordered ABF to reinstate Manso with backpay. *Id.* at B18-B21.

5. The Tenth Circuit enforced the Board's order. Because Manso's dishonesty, tardiness, and antiunion animus all contributed to ABF's discharge decision, the court also analyzed this case as one involving mixed motives. It held that ABF thus bore the burden of showing that it would have discharged Manso absent any protected union activity, and determined that there was substantial evidence supporting the Board's decision that ABF had not met its burden. Pet. App. A16, A18.

Although neither the Board nor the Tenth Circuit questioned the ALJ's finding that Manso had lied to his employer and again under oath at the administrative hearing, the court of appeals nevertheless rejected ABF's argument that granting reinstatement and backpay to Manso would violate the policies of the Act. Pet. App. A18-A19. Without addressing the fact that Manso had perjured himself during administrative proceedings on his unfair labor practice charge, the court of appeals stated that "Manso's *original* misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus," and that in those circumstances the Board had discretion to order Manso reinstated with backpay. *Id.* at A19 (emphasis added). The court therefore granted the Board's petition for enforcement. *Id.* at 20.

ARGUMENT

In ordering petitioner ABF to reinstate Michael Manso with full backpay after he lied under oath as to a highly material issue during proceedings upon his unfair labor practice charge, the NLRB exceeded its statutory authority. The Board undoubtedly has broad discretion to craft appropriate remedies for unfair labor practices. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). But its discretion is not unlimited. Congress empowered the Board, upon finding that an employer committed an unfair labor practice, to issue "an order requiring [the employer] to cease

and desist * * *, and to take such affirmative action including reinstatement of employees with or without back pay, *as will effectuate the policies of this [Act].*" NLRA § 10(c), 29 U.S.C. § 160(c) (emphasis added). In consequence, the Board lacks the statutory power to order remedies that cannot "fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943). See also, *e.g.*, *NLRB* v. *Apico Inns of California, Inc.*, 512 F.2d 1171, 1175 (9th Cir. 1975) ("The Board's discretion is not * * * absolute * * *. No reinstatement should be ordered if the policies of the Act are not furthered by such an order").

The Board's reinstatement and backpay order in this case is wholly inconsistent with maintaining the reliability and integrity of decisionmaking procedures under the NLRA, and also with orderly collective bargaining and peaceful labor relations. Accordingly, because the Tenth Circuit's judgment enforcing that order is at odds with the goals of the NLRA, it should be reversed.

I. AN EMPLOYEE WHO ABUSES THE BOARD'S ADJUDICATIVE PROCESS BY LYING UNDER OATH AS TO A MATERIAL ISSUE DURING AN UNFAIR LABOR PRACTICE HEARING IS DISQUALIFIED FROM OBTAINING REMEDIES OF REINSTATEMENT OR BACKPAY

By ordering the reinstatement with backpay of an employee who had perjured himself as to facts material to the issue before the ALJ in unfair labor practice proceedings, the Board in this case condoned "a cynical usurpation of [its own] factfinding process." *Precision Window Mfg., Inc.* v. *NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992). Like the Eighth Circuit in *Precision Window*, this Court should "refus[e] to take the Board's processes as lightly as the Board apparently does." *Ibid.* Rather, this Court should make clear that the Board's remedial authority does not extend to ordering affirmative relief for an employee who has lied under oath about a material issue. Because the Board's order encourages deceit and undermines the integrity of the Board's procedures, it

is inconsistent with the policies of the NLRA to promote labor peace through collective bargaining, which depend for their implementation on the *accurate* adjudication of unfair labor practice and other disputes. See *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971) ("The purpose of the Act was to obtain 'uniform application' of its substantive rules").

A. Manso Lied Under Oath As To A Material Issue During The Unfair Labor Practice Proceedings

There is no dispute that Michael Manso knowingly was "lying * * * when he reported that his car had overheated and that he was late for work because of car trouble." Pet. App. B59. Initially, Manso told this lie to his supervisors at ABF. Having been warned by them that an unexcused tardiness would be grounds for dismissal (*id.* at A10), he simply invented an excuse. ABF detected Manso's lie and discharged him, saying that this action was being taken pursuant to a company policy that prohibited preferential casual dockworkers from being late to work on more than one occasion without good reason. *Id.* at B18.

Manso's lies did not stop there, however. When Manso grieved his discharge, he repeated his concocted story — first to the grievance panel (Pet. App. A10), and then, after he filed an unfair labor practice charge, under oath to the Administrative Law Judge. ALJ Tr. 127-134, 505. In the unfair labor practice proceedings, ABF was able to call as a rebuttal witness a police officer who explained that when he pulled Manso over for speeding, Manso was alone in the car. This evidence contradicted Manso's sworn testimony that his wife picked him up to take him to work after his car broke down, and exposed his false testimony. *Id.* at 511; Pet. App. B59.

Manso's perjured testimony before the ALJ was indisputably material to the unfair labor practice charge, and neither the Board nor the Tenth Circuit suggested otherwise. His representation that he had good reason for being late to work — had it been credited — could have provided an important ground for ruling that his dismissal constituted an unfair labor practice. It would have established that when ABF fired Manso, it violated its own policy that only an unexcused tardiness should count against a preferential casual employee. This would certainly have been regarded as strong evidence that ABF's motives in firing Manso were illegitimate. *Cf.* Pet. App. B15 n.11. Manso's lie therefore lay at the very heart of the issue before the ALJ.

Manso's lie was no less material merely because it was exposed at the hearing and because the Board's decision that ABF committed an unfair labor practice when it fired Manso ultimately rested on other facts. A false statement going to an issue in a case does not suddenly become immaterial because the lie is subsequently discovered and therefore plays no part in the decision reached. *Cf. United States* v. *Molinares*, 700 F.2d 647, 653 (11th Cir. 1983) (for purposes of 18 U.S.C. § 1623, which criminalizes "false material declarations" made under oath before a court or grand jury, "'[t]he test for materiality is whether the false testimony was capable of influencing the tribunal on the issue before it'"); *United States* v. *Berardi*, 629 F.2d 723, 728 (2d Cir. 1980) (under § 1623, a false statement under oath that hinders inquiry is material, and the effect of the statement "is measured in terms of potentiality, rather than probability * * *. It is of no consequence that the information sought would be merely cumulative, [or] that the response was believed by the [tribunal] to be perjurious at the time it was uttered"). Had Manso's lie *not* been discovered, his testimony might well have formed a basis for the Board's decision. For that reason, it was clearly material.

B. Ordering Reinstatement With Backpay Of An Employee Who Has Lied Under Oath As To A Material Matter Does Not Effectuate The Purposes Of The NLRA

Because Manso's lie under oath was highly material to the question before the ALJ, it threatened "to undermine the Board's unfair labor practice proceedings" and amounted to a serious "abuse of the Board's processes." *Service Garage, Inc.*, 256 NLRB 931, 931 (1981), enforcement refused on other grounds,

668 F.2d 247 (6th Cir. 1982). The Board completely ignored this conduct. In requiring ABF to reinstate Manso with backpay, the Board gave Manso the very same relief that he would have obtained had he not tried to perjure his way to a favorable ruling. By so doing, the Board "pervert[ed] the purposes of the [NLRA]" (*Virginia Elec. & Power Co.*, 319 U.S. at 541) and forfeited the deference usually due its remedial orders. *Litton Financial Printing Div.* v. *NLRB*, 111 S. Ct. 2215, 2223 (1991) (no special deference is owed to the Board when its "remedial discussion is not grounded in terms of any need [for the particular remedy] in order 'to effectuate the policies of the Act'").

The effect of the Board's reinstatement and backpay order is to encourage complaining witnesses to manipulate the Board's factfinding process by giving false testimony under oath. Under the Board's approach, an employee appears to have nothing to lose by lying during unfair labor practice proceedings — but may benefit if the lies are believed. In thus skewing an employee's incentives away from telling the truth, the Board has created "a very real barrier to the effectuation of the policies of the Act," which can be achieved only through reliable, accurate Board decisionmaking. *Virginia Elec. & Power Co.*, 319 U.S. at 540-541. The Board's statutory obligation is rather to "depriv[e] [the employee of the] advantages [he sought to] accru[e] from [his] particular method of subverting the Act," by denying the affirmative remedies of reinstatement and backpay. *Id.* at 541. See, *e.g.*, *Iowa Beef Packers, Inc.* v. *NLRB*, 331 F.2d 176, 185 (8th Cir. 1964) (employee's material false testimony at a hearing on his unfair labor practice charge required "forfeiture of [the reinstatement] remedy * * * to serve the policy of the Act"); *NLRB* v. *Magnusen*, 523 F.2d 643, 646 (9th Cir. 1975) (reinstatement with backpay for an employee who "severely impeded the vital factfinding process by repeated lying" fails to "'effectuate the policies of the Act'"); *Alumbaugh Coal Corp.* v. *NLRB*, 635 F.2d 1380, 1386 (8th Cir. 1980) ("[T]he purposes and policies of the Act do not justify full reinstatement of an employee * * * whose untruthful testimony abused the process he now claims should grant him full relief"); *NLRB* v. *Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964).

ATA urges this Court to adopt a bright-line and readily applied standard that would permit the Board to remedy unfair labor practices while barring it from ordering affirmative relief that serves to undercut its own factfinding procedures. Such a test, we believe, would focus on the employee's false testimony in the context of the particular adjudicative process. It would require that when an employee is found to have lied under oath during administrative proceedings against the employer, his false testimony should be analyzed in light of the issues before the tribunal. If the employee's lies were material to those issues and hence threatened to undermine the adjudicative process, the employee must forfeit those fruits of the process he abused that would redound to his personal benefit. Thus, the employee would be barred from obtaining reinstatement or backpay. The NLRB would remain free, however, to enforce the Act and its prohibitions by imposing sanctions against the employer that do not reward that employee's false testimony, such as issuing a cease and desist order, requiring the employer to post notices of the violation, and ordering reinstatement and backpay for employees who did not testify falsely.

Applied in this case, this standard mandates reversal. Manso's false testimony was highly relevant to the issue before the Board in the unfair labor practice proceedings, and therefore amounted to an abuse of the Board's factfinding process. In these circumstances, the Board lacks authority, under the Act, to reward Manso with affirmative remedies that benefit him personally. It may, however — and did (Pet. App. B27-B28; B65-B68) — enforce ABF's obligations by ordering it to cease and desist from discriminatory actions based on union activity and to post notices.

The Tenth Circuit erred because it focussed not on Manso's material lies to the ALJ, but on the lies Manso told to his employer. The court of appeals excused Manso's repetition under oath of an "original misrepresentation" that had been "made to his

employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus." Pet. App. A19. The court then purported to find a distinction between these circumstances and a case in which "the employee lied *in the first instance* during the administrative hearing" as to a material issue. *Ibid.* (emphasis added).

To articulate this distinction is to refute it. Whatever justification Manso may originally have had for lying to his supervisors about why he was late to work, it did not apply once he was testifying before a neutral tribunal adjudicating his unfair labor practice charge. Manso had absolutely no justification for repeating his lie under oath to the ALJ. He could have told the truth, explaining why he had felt compelled to lie to his employer. Instead, he chose to try to hoodwink the ALJ into believing that he had a valid excuse for his tardiness and for that reason should not have been discharged under ABF's lateness policy. It cannot conceivably be material to the proper treatment of Manso's lie, repeated under oath and calculated to interfere with the tribunal's decisionmaking, that his earlier misrepresentation to ABF might be explicable as a reaction to perceived unfairness on the part of the employer. Because Manso's false testimony undermined the Board's factfinding process, his reinstatement with backpay was inconsistent with the purposes of the NLRA, and the Tenth Circuit's judgment should be reversed.

II. THE BOARD MAY NOT ORDER AN EMPLOYER TO REINSTATE AN EMPLOYEE WHOSE POST-DISCHARGE FALSE TESTIMONY WOULD HAVE WARRANTED DISCHARGE

ATA submits that there is an alternative reason why the Board's grant of full backpay and reinstatement to Manso cannot stand. Even an employer who has unquestionably violated the Act may not properly be forced to reinstate and an employee who engaged in serious misconduct subsequent to discharge (or whose previous misconduct comes to light after discharge), where that misconduct would justify termination. *E.g.*, *Alumbaugh Coal*

Corp. v. *NLRB*, 635 F.2d 1380, 1384-86 (8th Cir. 1980); *Big Three Industrial Gas & Equip. Co.*, 212 NLRB 800, 803 (1974), enforcement granted, 512 F.2d 1404 (5th Cir. 1975). *Cf.*, *e.g.*, *Washington* v. *Lake County*, 969 F.2d 250 (7th Cir. 1992) (Title VII). In such cases, the proper remedy might include partial backpay (up to the time the employee would have been terminated for the subsequent misconduct), but would not include reinstatement.

Manso's lies before the administrative law judge were told to deceive the ALJ, were directed at ABF, and were intended to influence the outcome of Manso's unfair labor practice charge. They were inexcusable. They were not reckless or impulsive remarks in response to unexpected questions, or misleading answers to ambiguous queries, or slanted assertions of opinion, or statements peripheral to the issue at the hearing. *Cf. Precision Window Mfg.*, 963 F.2d at 1108 (leaving "some leeway" for "impulsive" post-discharge misconduct); *Big Three Industrial Gas & Equip. Co.*, 212 NLRB at 800, 803 (affirming ruling of the ALJ, who held that the remedies of reinstatement and backpay are appropriate where the employer does not demonstrate that the employee's testimony was false, "that it was uttered with intent to deceive, and that it related to a substantial issue"); *Arvey Paper & Office Products*, 1992 NLRB LEXIS 1432, at *73 (ALJ decision Dec. 11, 1992) (reinstatement and backpay are permissible remedies where the discredited portions of an employee's testimony were immaterial). Rather, Manso's story was an elaborate and premeditated fabrication of events fundamental to the unfair labor practice proceeding. Whatever ABF's original reasons for discharging Manso, his false testimony provided a more than sufficient justification for ABF, the intended victim, to have discharged him at the time of this new and "independent wrong" against the company. *Alumbaugh Coal*, 635 F.2d at 1385. See also *Precision Window Mfg.*, 963 F.2d at 1108 ("[A]n employee is not free to engage in wanton conduct following an unlawful discharge and then hide behind the Act's protections").

Requiring reinstatement with full backpay of a person who has committed such a serious post-discharge wrong penalizes the employer and continues to penalize it indefinitely (*NLRB* v. *Breitling*, 378 F.2d 663, 664 (10th Cir. 1967)), while at the same time granting a windfall to the employee whose misconduct provided an independent ground for dismissal. This result is squarely at odds with the goals of the NLRA to encourage collective bargaining and promote peaceful labor relations. *NLRB* v. *Local Union No. 1229*, 346 U.S. 464, 472 (1953) (the "Act seeks to strengthen * * * that cooperation * * * and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise"). The NLRA's purposes cannot conceivably be advanced by forcing upon the employer a worker whom the employer would have ample grounds to fire because of his post-discharge false testimony against the employer. On the contrary, reinstatement in such a case will result in antagonistic work relations. See *Alumbaugh Coal*, 635 F.2d at 1385-1386 (declining to enforce reinstatement and backpay order where employee's post-discharge misconduct had "adversely affected his employer"); *Coca-Cola Bottling Co.*, 333 F.2d at 185 (holding that an employee's "misconduct exemplified by his pattern of falsification and deceit during his employment with the Company, climaxed by his false testimony at [an administrative] hearing, * * * disqualifies him from reinstatement"; "[t]o force him upon the Company under such circumstances would bring about an impossible situation"); *NLRB* v. *Brookshire Grocery Co.*, 919 F.2d 359, 366 (5th Cir. 1990) (courts are "reluctan[t] to force reinstatement where to do so would condone behavior that a reasonable employer would not wish in its workplace").

In order to effectuate the goals of the Act, the remedy for unlawful termination should therefore be circumscribed where an employee has engaged in material post-discharge false testimony which is an independent ground for discharge. In such cases, reinstatement should not be available, and backpay should be limited to that amount accruing before the employer became aware that the employee had committed false testimony and thus had

lance Service, 292 NLRB 835, 835 n.7 (1989) (misconduct during the backpay period will cut off backpay at the time the employer acquires knowledge of it).[4]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[4] This Court recently granted certiorari in a case in which the Sixth Circuit held that a Title VII plaintiff is barred from receiving any backpay where the employer, subsequent to unlawfully terminating the employee, discovers evidence that the employee lied on her employment application. *Milligan-Jensen* v. *Michigan Tech. University*, No. 92-1214 (cert. granted June 21, 1993). While an affirmance in *Milligan-Jensen* would suggest that reversal may be appropriate here — for Manso's perjury was a far more serious form of misrepresentation than that which would have justified termination of the employee in *Milligan-Jensen* — our argument here concerns the remedial rules necessary to effectuate an entirely different statutory scheme, and this Court's decision in *Milligan-Jensen* will not be controlling.

No. 92-1550

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the Women's Legal Defense Fund ("WLDF") respectfully submit this brief as *amici curiae*. The written consents of the parties are being filed with the Clerk of this Court simultaneously with this brief. This brief urges affirmance of the Tenth Circuit's decision in *Miera v. National Labor Relations Board*, 982 F.2d 441 (10th Cir. 1992), and thus supports the position of Respondent.

INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee is a nonprofit organization that was established at the request of the President of the United States in 1963, to involve leading members of the

bar throughout the country in the national effort to ensure civil rights to all Americans. It has represented, and assisted other lawyers in representing, numerous plaintiffs in administrative proceedings and lawsuits under Title VII in the lower courts. *See, e.g., Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *See, e.g., Landgraf v. USI Film Products*, No. 92-757 (*cert. granted*, 61 U.S.L.W. 3580, Feb. 22, 1993); *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S.Ct. 2742 (1993); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Hazlewood School District v. United States*, 433 U.S. 299 (1977); *Chandler v. Roudebush*, 425 U.S. 840 (1976).

The Women's Legal Defense Fund is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. The WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, the WLDF has placed special emphasis on equal employment opportunity for women of color, who often face job discrimination based on both race and gender. WLDF's participation as *amicus* in Title VII cases before this Court includes *United Auto Workers v. Johnson Controls*, —— U.S. ——, 111 S.Ct. 1196 (1991), *Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989), *Johnson v. Transportation Agency of Santa Clara Cty.*, 480 U.S. 616 (1987), *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

The question presented in this case is whether an employee who was unlawfully discharged under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, must be denied the remedies of reinstatement and backpay if the administrative law judge concludes that any portion of the employee's testimony at the hearing into the employer's unlawful conduct was "purposefully" untrue. The resolution of that question turns primarily on the principles governing the National Labor Relations Board's broad discretion to remedy unfair labor practices under the NLRA.

Petitioner mistakenly argues, however, that Title VII principles support the adoption of a *per se* rule that unlawfully discharged employees nonetheless forfeit their right to reinstatement and backpay if they are subsequently found to have given false testimony of any kind at the hearing into their employer's unlawful conduct. Petitioner relies specifically on lower court decisions holding that certain "after acquired" evidence of an employee's misrepresentations or misconduct during the employment relationship may disqualify the employee from reinstatement, and limit or bar an award of backpay.

The decision in this case may therefore have implications for the availability of reinstatement or backpay to employees who are the victims of unlawful employment practices under other federal statutes, including Title VII, the Equal Pay Act, and other antidiscrimination statutes. The Lawyers' Committee and the WLDF have an interest in the adoption of legal principles that will result in the sound administration of federal antidiscrimination laws. As the *amici* argue in this brief, a bright line "after acquired evidence" rule as suggested by Petitioner is inconsistent with the remedial purposes of Title VII and analogous statutes, and with the Court's prior decisions.

STATEMENT

1. Michael Manso was employed as a casual dockworker in Petitioner's Albuquerque truck terminal. *ABF Freight System, Inc.*, 304 N.L.R.B. 585, 585 (1991). Effective May 29, 1988, a new collective bargaining agreement between Petitioner and the Teamsters provided casual dockworkers with certain preferential employment rights. *Id.* A dispute soon arose concerning the effect of the new agreement, with Petitioner taking the position that Manso and certain other casuals did not qualify for preference and could be discharged. *Id.* at 586. Petitioner terminated Manso and eleven other casual dockworkers on June 20, 1988. *Id.* at 586-87.

The union filed a grievance on behalf of the terminated workers. *Id.* at 587. In addition, on November 21, 1988, as the dispute proceeded through the grievance procedure, Manso and another worker filed an unfair labor practice charge. *Id.* at 589. On April 6, 1989, at the final step of the grievance process, the grievance committee ordered the terminated employees reinstated without backpay. *Id.* at 587. Manso returned to work on April 24, 1989. *Id.* at 589.

2. Upon his return to work, three of Manso's supervisors told him that Petitioner was out to get him for having filed the grievance and the unfair labor practice charge. The threats proved to be true; Manso was terminated twice over the next four months. Manso's first termination arose out of Petitioner's practice of verifying calls to work made to preferential casuals. Under this new policy—applicable only to preferential casuals like Manso—a supervisor in need of a preferential casual to work the next shift would have a union member telephone the casual. *Id.* at 597. If the casual did not answer, the union member would be asked to sign a written verification that the call had been made and that there had been

no response. *Id.* Two such failures to respond permitted the termination of a preferential casual. *Id.*

On May 8, 1989, Manso received a warning letter for failing to respond to a call to work made on May 6. *Id.* On June 19, Supervisor Ronald Ford asked union member Jeff Motter to verify a telephone call to Manso to come to work. *Id.* When Manso did not respond to the call, Motter told Ford that he feared he had misdialed Manso's telephone number, and asked to make the call again. *Id.* Ford refused Motter's request. *Id.* Manso was discharged for failing to respond to the June 19 call to work. *Id.* Manso grieved the discharge and was reinstated without backpay at the first level of the grievance procedure. *Id.* at 589.

On August 11, 1989, Manso arrived four minutes late to begin work on the 5:00 a.m. shift and was issued a warning letter. *Id.* At this time, Petitioner had no policy regarding tardy preferential casual dockworkers. *Id.* at 591. Six days later, Manso arrived nearly one hour late for the 5:00 a.m. shift. *Id.* at 589. Manso explained that his car had broken down on the way to work and that he had called his wife to come pick him up on the highway. *Id.* at 597. Manso further explained that, with his wife in the car, he drove to work and was stopped by a Deputy Sheriff for speeding. *Id.* Petitioner determined that Manso fabricated this story, and terminated Manso under a newly-instituted policy applicable only to preferential casuals permitting termination for two unexcused absences. *Id.* at 589. Manso grieved the discharge, but lost at the first step and took the grievance no further. *Id.* at 597. Manso then filed a second unfair labor practice charge.

3. The two unfair labor practice charges against Petitioner were consolidated for hearing. J.A. 4.[1] With re-

[1] The Joint Appendix filed with the Brief for Petitioners is cited as "J.A. ——." The Board, disagreeing with the administrative

spect to the second charge, the Board, agreeing with the administrative law judge, concluded that Petitioner unlawfully discharged Manso in June 1989 in retaliation for Manso's filing of the grievance and unfair labor practice charge. Disagreeing with the administrative law judge, the Board concluded that the discharge in August 1989 was also unlawful. The Board ordered Manso reinstated with backpay.

a. In concluding that Manso had been unlawfully discharged in both June and August 1989, the Board adopted the administrative law judge's findings on credibility. *Id.* at 585. In particualr, Manso testified that, upon his return to work in April 1989, three of his supervisors made threatening statements: Supervisor Lovato told Manso to "watch [his] . . . step [because] ABF was gunning" for him (J.A. 96); Supervisor McNutt told Manso "to be careful because the higher echelon was after" him (J.A. 97); and Supervisor Beeson told Manso, "Let's see how long it takes them to get rid of you this time." (J.A. 99). Although each of these supervisors unequivocally denied making these statements to Manso, (J.A. 91 (Lovato), 118 (McNutt), 56 (Beeson)), the judge found Manso's statements to be truthful. *ABF Freight System, Inc.*, 304 N.L.R.B. at 597.

In addition, union member Motter testified that he told Supervisor Ford he may have misdialed Manso's number on the morning of June 19, and that his request to redial Manso's telephone number was refused by Ford. J.A. 122. Supervisor Ford flatly denied that Motter said he feared he had misdialed Manso's number or asked to redial the number. J.A. 64. The administrative law judge

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law judge, found that the initial discharge of Manso and the other casuals in June 1988 did not violate the NLRA because it had been based on Petitioner's reasonable interpretation of the collective bargaining agreement. *ABF Freight System, Inc.*, 304 N.L.R.B. at 585.

found Motter to be telling the truth. *ABF Freight System, Inc.*, 304 N.L.R.B. at 597.

Finally, at the hearing Manso repeated his explanation for his tardiness on August 17. J.A. 104-07. The Deputy Sheriff who stopped Manso for speeding, however, testified that Manso was alone when stopped. *Id.* at 126-27. The administrative law judge found Manso's explanation for his tardiness to be untrue. *ABF Freight System, Inc.*, 304 N.L.R.B. at 600.

b. Although the administrative law judge found it "apparent . . . that the [Petitioner] . . . harbored animus against Manso for engaging in protected activities," the judge found that Manso was lawfully terminated for cause in August 1989 because he had been dishonest about the reason for his tardiness on the morning of August 17. *Id.* The Board, however, found the judge's conclusion that Manso had been fired for dishonesty to be based upon a "plainly erroneous factual statement of the . . . asserted reasons" for the discharge. *Id.* at 590.

In the Board's view, the testimony of Petitioner's own witnesses established that Manso was assertedly fired because of his second unexcused tardiness, not dishonesty. *Id.* Moreover, the Board found further that Petitioner's treatment of Manso under the newly instituted lateness policy was not consistent with its previous treatment of other casual workers, and was pretextual. *Id.* at 590-91. The Board concluded that a *prima facie* case of unlawful discrimination had been made, and that Petitioner failed to show that it would have fired Manso even if he had not been engaged in protected activities. *Id.* at 591.

4. The court of appeals, affirming the Board, found "abundant evidence" in the record of "antiunion animus in ABF's conduct towards Manso." *Miera v. National Labor Relations Board*, 982 F.2d 441, 446 (10th Cir. 1992). The court further found that substantial evidence supported the Board's determination that Manso was not

discharged for cause, but instead had been the victim of an unlawful discriminatory discharge. *Id.* Finally, the court of appeals found that the Board had not abused its "considerable discretion" by awarding backpay and reinstatement to Manso, even though Manso had repeated his false explanation for being late to the administrative law judge. *Id.* at 447. As the court observed, Manso's "misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus." *Id.*

SUMMARY OF ARGUMENT

Petitioner asserts that Title VII jurisprudence supports the adoption of a "bright line test" prohibiting the Board from awarding reinstatement and backpay to the victim of an unfair labor practice who testifies falsely in Board proceedings. *See* Pet. Brf. 30.[2] This Court's Title VII jurisprudence does not support the creation of the bright-line rule Petitioner requests. Title VII clearly places the award of injunctive relief and backpay within the discretion of the trial court. Under *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), this discretion must be exercised consistent with Title VII's twin objectives of providing make whole relief to the victims of discrimination and of providing employers with incentives voluntarily to examine and correct discriminatory practices.

Petitioner argues that a so-called "after-acquired evidence rule" limits the trial court's discretion to fashion make whole relief for the victims of unlawful discrimination. In fact, there is serious disagreement among the lower courts as to the effect, if any, to be given to after-acquired evidence of employee misconduct unrelated to the challenged employment decision. In any event, none

[2] The Brief for Petitioner is cited as "Pet. Brf. ——."

of the lower court decisions cited by Petitioner supports a rule barring make whole relief as a sanction for statements made in the course of an adjudicatory proceeding.

This Court has recently held that Title VII does not serve to punish employer misrepresentations to a trial court. *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S.Ct. 2742 (1993). By the same token Title VII should not be transformed into a statute punishing employee misconduct. To the extent that Title VII jurisprudence is applicable in the NLRA context, it supports the continued exercise of the Board's discretion in light of the purposes of the NLRA, not the establishment of a bright line rule punishing the victims of anti-union animus.

ARGUMENT

TITLE VII AND ITS JURISPRUDENCE DO NOT SUPPORT THE ADOPTION OF A BRIGHT LINE RULE DENYING MAKE WHOLE RELIEF TO CHARGING PARTIES WHOSE TESTIMONY IS DISCREDITED IN BOARD PROCEEDINGS

I. TITLE VII REQUIRES THAT THE AWARD OF MAKE WHOLE RELIEF BE LEFT TO THE DISCRETION OF THE TRIAL COURT CONSISTENT WITH THE PURPOSES OF THE ACT

Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), governs the award of make-whole relief, including backpay and reinstatement, in Title VII cases. Section 706(g) provides in pertinent part that, upon finding a discriminatory employment practice, the trial court

> may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, . . . hiring of employees, with or without backpay, . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g).

This Court has long emphasized that the text of Section 706(g) "implicitly recognizes" that the appropriate remedy may vary from case to case, and that fashioning the proper Title VII remedy lies in the first instance within the discretion of the trial court. *Albemarle Paper*, 422 U.S. at 415-16. The federal courts "are empowered to fashion such relief as the particular circumstances of a case may require" to remedy a Title VII violation. *Franks*, 424 U.S. at 764.

The trial court's discretion, however, is not unfettered. The fashioning of a remedy must be exercised " 'in light of the large objectives' " of Title VII. *Albemarle Paper*, 422 U.S. at 416, *quoting Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944). In particular, this Court has emphasized that the make whole remedies of Section 706(g)—including both back pay and reinstatement—

> should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

Albemarle Paper, 422 U.S. at 421 (backpay); *Franks*, 424 U.S. at 771 (seniority).[3]

[3] Both *Albemarle Paper* and *Franks* relied on the legislative history accompanying the 1972 amendments to Section 706(g) as evidence that Congress had "strongly reaffirmed the 'make whole' purpose of Title VII." *Albemarle Paper*, 422 U.S. at 421; *Franks*, 424 U.S. 763-64. As the Section-by-Section Analysis of the 1972 amendments makes clear,

> relief [under Section 706(g)] is intended to make the victims of unlawful discrimination whole, and . . . attainment of this objective rests not only upon the elimination of the particular unlawful practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 Cong. Rec. 7168 (1972).

Despite this Court's admonition that the limits on Title VII remedies must be consistent with the aims of the statute, some courts have adopted various after-acquired evidence rules, or "after the fact" defenses, permitting an employer to defend against an employment discrimination claim on the basis of prior misconduct discovered *after* the employment action at issue. *See* Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employee's Termination As a Defense in Employment Litigation*, XXIV Suffolk Univ. L. Rev. 1, 4 (1990). In *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), the Tenth Circuit found that evidence of employee misconduct discovered during litigation would deny a plaintiff any relief under Title VII and the Age Discrimination in Employment Act (ADEA). The court of appeals reasoned that this Court's decision in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), supported the denial of relief under Title VII and the ADEA if the employer would legitimately have fired the plaintiff had it known of the misconduct. *See Summers*, 864 F.2d at 706-08. The Sixth Circuit has recently taken *Summers* to its logical conclusion and has announced that after-acquired evidence which, if known, would have justified termination demonstrates that the employee "suffered no legal damage" and provides an affirmative defense to a valid claim of illegal discrimination. *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302, 304-05 (6th Cir. 1992), *cert. granted*, —— U.S. ——, 113 S.Ct. 2991 (1993) (dismissed).[4]

This Court should reject Petitioner's contention that the after-acquired evidence cases properly limit a trial

[4] Petitioner also cites *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992), as supportive of its Title VII argument. *Johnson*, however, was brought under Michigan's Elliott-Larsen Civil Right Acts, decided on the basis of Michigan common law, and nowhere mentions Title VII. *See* 955 F.2d at 410, 412-13.

court's discretion in fashioning Title VII relief. Most basically, these cases contravene the purposes of Title VII because they insulate proven wrongdoers and bar proven victims from all remedy.

The affirmative defense[5] created by *Summers* and its progeny is "antithetical" to the objectives of Title VII. *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1180 (11th Cir. 1992). *See also Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 (7th Cir. 1989) (rejecting argument that employee misrepresentation is relevant to ADEA liability of employer); Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 Tex. L. Rev. 17, 97 n.311 (1991) (affirmative defense contrary to Title VII's aims). As the *Wallace* court reasoned, providing an affirmative defense

> does not encourage employers to eliminate discrimination. Rather it invites employers to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination because *Summers* gives them the option to escape all liability by rummaging through an unlawfully-discharged employee's background for flaws and then manufacturing a 'legitimate' reason for the discharge that fits the flaws in the employee's background.

Wallace, 968 F.2d at 1180.[6]

Indeed, *Summers* represents an "unwarranted extension" of *Mt. Healthy*. *Id.* at 1179. The *Wallace* court explained that *Mt. Healthy* excuses liability if an employer demonstrates that it would have taken the same employment decision, absent any discriminatory motive, based on the information it had in its possession at the time the decision was made. *Id., citing Mt. Healthy*, 429 U.S. at 285-86. The *Summers* affirmative defense, to the contrary,

> excuses all liability based on what *hypothetically* would have occurred absent the alleged discriminatory motive *assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge.*

Wallace, 968 F.2d at 1179 (emphasis in original).[7]

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[5] There is considerable doubt that the federal courts have the authority to create an affirmative defense to a Title VII action in light of the comprehensive enforcement scheme created by Congress in the civil rights laws. As the Court has previously observed in the context of Title VII, *see Albemarle Paper*, 422 U.S. at 423 n.17 & 444 (refusing to enlarge Title VII's limited statutory good faith defense), and elsewhere, it is inappropriate for the federal courts to "invok[e] broad common law barriers to relief where a private suit serves important public purposes." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968) (reversing lower court's adoption of *in pari delicto* defense to private antitrust action).

[6] The *Wallace* court was also concerned that the creation of an affirmative defense would provide hiring officials with an opportunity to "sandbag" employees whom they intend to harass sexually:

> *Summers* encourages an employer with a proclivity for unlawful motives to hire a woman—despite knowledge of a legitimate reason that would normally cause the employer not to employ her—to destroy any evidence of such knowledge, to pay her less on the basis of her gender, to sexually harass her until she protests, to discharge her, and to "discover' the legitimate motive during the ensuing litigation, thus escaping any liability for the unlawful treatment of the erstwhile employee.

Wallace, 968 F.2d at 1180-81.

[7] Given that in these cases the after-acquired "legitimate" reason for discharge could not have motivated the employer's action, the *Summers* affirmative defense actually places the victim of discrimination in a worse position than those who are not members of a protected class. The affirmative defense thus contravenes "the *Mt. Healthy* principle . . . that the plaintiff should be left in no worse a position than if she had not been a member of a protected class." *Wallace*, 968 F.2d at 1179.

Rather than permitting information about which an employer was unaware (and which could not have supplied the basis for an employment decision) to insulate unlawful behavior, after-acquired evidence should properly be left to the remedy stage of a Title VII proceeding, where its effect is "best decided on a case-by-case basis." *Wallace*, 968 F.2d at 1181. While after-acquired evidence of serious misconduct may warrant a court's discretionary refusal to reinstate a victim of unlawful discrimination, after-acquired evidence should, as *Wallace* noted, have "no bearing on the availability *vel non* of a backpay award." *Id.* at 1182 n.12. A backpay award should not be prematurely terminated due to after-acquired evidence unless the employer can show that it would have discovered the after-acquired evidence before what would otherwise be the end of the backpay period absent its unlawful discrimination and any attendant litigation. *Id.* at 1182. Shortening the backpay period to the date of discovery of the after-acquired evidence—particularly if discovery occurs in anticipation of or during the discrimination litigation—places the plaintiff in a worse position than those outside a protected class and provides

> a windfall to employers who, in the absence of their unlawful act and the ensuing litigation, would never have discovered any after-acquired evidence.

Id.[8]

Even if the after-acquired evidence cases provided Petitioner with a limitation on the trial court's discretion consistent with the purposes of Title VII, Petitioner's effort to use these cases to support a bright line rule based on after-occurring misrepresentations suffers from at least two other substantial flaws.

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[8] In *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364, 371 (7th Cir. 1993), the court limited backpay to the date the employer discovered during depositions that the plaintiff had inflated his educational background when he was hired, some five years before his termination. The employer in this instance gained the very windfall warned of in *Wallace*.

First, the lower court decisions on which Petitioner relies involve the later discovery of evidence of employee misconduct occurring prior to or during the employment relationship. Those cases do not have anything to do with employee misstatements made during the course of adjudicative proceedings that have been convened solely because of the employer's unlawful conduct. The conduct of witnesses at such a hearing, including a party, is simply irrelevant to the employment relationship or the employer's unlawful conduct, as we discuss in Part II below.

Second, even with respect to cases involving after-acquired evidence of employee misconduct during the employment relationship, the lower court cases generally require that a misrepresentation be material to the employment relationship: the employer must show that it would have, absent any discrimination, made the same employment decision had it known of the after-acquired evidence.[9] *See Summers*, 864 F.2d at 708; *Washington v. Lake Cty.*, 969 F.2d 250, 255 (7th Cir. 1992); *Milligan-Jensen*, 975 F.2d at 304-05. This critical aspect of the defense is a burden that Petitioner could not meet in this case.[10] The after-acquired evidence rules therefore do not

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[9] The materiality requirement "weakens the incentive for an employer to engage in a fishing expedition for 'minor, trivial or technical infractions'" for use against a plaintiff. *Washington*, 969 F.2d at 255-56, *quoting O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656, 659 (D. Utah 1990). Indeed, without a materiality requirement, the after-acquired evidence becomes merely another pretext for the employer's discriminatory action.

[10] Although Petitioner was aware of Manso's misrepresentation, the Board found that Manso was pretextually terminated for tardiness, not lying. *ABF Freight System, Inc.*, 304 N.L.R.B. at 590. The Tenth Circuit found the Board's determination to be supported by substantial evidence. *Miera*, 982 F.2d at 446. In light of the Tenth Circuit's application of the appropriate standard of review, this factual finding is not subject to further question. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 491 (1951).

support the creation of a bright line rule based on misrepresentations which—as in this case—were irrelevant in the employment context.

II. PETITIONER'S REQUEST FOR A BRIGHT LINE RULE IS INCONSISTENT WITH THIS COURT'S DECISION IN *HICKS*

As noted above, none of the after-acquired evidence cases purport to reach misrepresentations occurring in proceedings held after the termination of the employment relationship. Petitioner is seeking the creation of an "after-occurring" evidence rule which would transform antidiscrimination statutes into laws sanctioning misconduct during adjudicative procedings. Last Term, in *St. Mary's Honor Center v. Hicks,* —— U.S. ——, 113 S.Ct. 2742, 2754 (1993), this Court rejected a similar argument: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." There is no reasoned basis for distinguishing this aspect of *Hicks* from Petitioner's Title VII argument. If under *Hicks* an employer does not lose a Title VII suit simply because it lied, neither should a victim of discrimination lose her Title VII action for the same infraction.

Petitioner's argument is in fact more extreme than the situation presented in *Hicks. Hicks* held that the finder of fact in a fair employment case was permitted—but not required—to draw the inference of unlawful discrimination from proof that the employer's proffered explanation of its action "was not believable." *Id.* at 2751. Indeed, the employer's proffer of a false "nondiscriminatory explanation" is a threat far more serious to the integrity of the fact-finding process than the kind of employee falsehood at issue herein: the false explanation in *Hicks* went to the very question of the employer's intent to discriminate, and proof of its falsity left the employer without any proffered "nondiscriminatory explanation," whereas the employee's untruth here pertained only to one of a host of subsidiary contextual issues.

The Court also noted that a "judgment for lying" rule was not a "fair and even-handed punishment for vice." *Id.* Again, the *Hicks* rationale militates against the bright line rule proposed by Petitioner. The record in this case discloses a failure to tell the truth by a number of witnesses before the administrative law judge—witnesses on *both* sides of the unfair labor practice dispute.

There is no doubt that Manso was an untrustworthy witness in one respect. The administrative law judge both credited Manso's testimony and on one point found him to be a liar. The same must be said of Petitioner's witnesses. The administrative law judge did not believe three of Petitioner's supervisory employees when they flatly denied making threatening statements to Manso soon after he returned to work in April 1989. The administrative law judge also rejected a fourth supervisor's assertions that union member Motter never complained of misdialing Manso's telephone number and never asked permission to redial Manso's number in May 1989.

The *amici* do not believe that there is any justification for lying under oath; nor do they suggest that significant employee misconduct should be condoned. The facts before the Court emphasize, however, the futility of creating a dispositive rule of decision based on a consideration —perjury—unrelated to the issues before a court. Every judge is faced with a mixture of truth and falsity as the evidence unfolds, but punishing lies unrelated to the employment relationship is not the purpose of a Title VII action—eradicating discrimination and providing relief to its victims are. As the Court in *Hicks* noted, lying to seek advantage in a court proceeding might have short term advantages, but "it also carries substantial risks, see Rules 11 and 56(g); 18 U.S.C. § 1621." *Hicks,* 113 S.Ct. at 2755. There is no reason to gut antidiscrimination laws simply to reinforce the existing rules against lying under oath. A bright line rule of the sort advocated by Petitioner would too often immunize intentional discrimination

and would prevent the trial court from weighing the appropriate factors in fashioning an appropriate remedy. Title VII does not support Petitioner's position.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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September 29, 1993

(9)

No. 92-1550

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 84 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

1. The National Labor Relations Board ("NLRB") found that the employer in this case violated §§ 8(a)(1), (3) & (4) of the National Labor Relations Act ("NLRA") by discriminatorily discharging an employee. Manso had filed grievances and NLRB charges concerning an earlier discharge, a finding not contested here. Section 10(c) of the NLRA provides that the Board can remedy unfair labor practices by issuing "an order requiring [the employer] to take such affirmative action including rein-

statement of employees, with or without backpay, as will effectuate the policies of this [Act]." Petitioner contends that because Manso was found to have testified untruthfully during the NLRB proceedings, albeit as to an issue ultimately irrelevant to the outcome of the case, the Board is precluded from ordering Manso's reinstatement with backpay.

2. Section 10(c) has three notable features, each pertinent to this Court's consideration of ABF Freight's absolutist contention in this case. First, because the statutory directive is to "effectuate the policies of this [Act]," the starting point for reviewing the Board's exercise of its remedial authority is delineation of the pertinent statutory policies. The statute itself and this Court's cases establish that the "ruling purpose" (*Labor Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 265 (1938)) of the Act is promoting labor peace by assuring employees the right of self-organization and collective action, including collective bargaining. The prohibitions on discriminatory discharges promote that fundamental purpose by assuring employees that employers cannot interfere with their job security because of their exercise of rights protected by the NLRA. And, as prohibitions upon *discrimination*, § 8(a)(3) and (4) protect both model and less-than-perfect employees from interference with their job rights because of collective activity or resort to the Board's processes.

Second, reinstatement and backpay are the remedies ordinarily appropriate to effectuate the protections accorded by the discriminatory discharge prohibition. These remedies neutralize the effect of the NLRA violation to the degree possible, by concretely demonstrating both to the discriminatee and to co-employees that statutory rights can be exercised without economic loss and by restoring employees who exercise their statutory rights to the workplace, and also remove the incentive to employers to engage in discriminatory discharges in the future. Because reinstatement and backpay, like other Board remedies, are designed not to correct private injuries but to give effect to the Act's public policies, these overall statutory considerations and not simply the interests of the discriminatee are pertinent in determining whether reinstatement and backpay are proper remedies in any set of generic circumstances.

Finally, the NLRB has broad discretion in determining when the policies of the Act would be vindicated by a particular remedy, and court review is commensurately narrow.

3. Against this background, the employer's contention that the Board is precluded from ordering reinstatement and backpay with regard to any employee who testifies untruthfully before a Board ALJ borders on the frivolous.

ABF Freight's position rests, first and primarly, upon the notion that since purposeful lying on the witness stand is (obviously) to be discouraged, the Board is compelled to impose a "forfeiture" of reinstatement and backpay on untruthful witnesses in order to vindicate its own processes. But the conclusion does not follow from the premise. The NLRB's *basic* function is protection of employee self-organization and collective bargaining, not assurance of truthtelling. There are civil and criminal remedies to further the latter purpose, so it is simply untrue that absent forfeiture of reinstatement and backpay, discriminatees have nothing to lose by lying during Board proceedings. Moreover, the employer's suggested forfeiture rule would violate the proscription against punitive actions by the Board, and would only selectively punish failure to testify truthfully, since witnesses for *respondent employers*, also required to testify truthfully (and no less likely, as this case shows, to fail to do so), would not be affected. Finally, the equitable "clean hands" maxim cannot supply a rationale for petitioner's "forfeiture" rule, since equitable doctrines cannot be imported wholesale into the statutory scheme of the NLRA, and since the

doctrine, in its own terms, would not apply to vindication of the Board's interest in truthfulness.

A secondary purported basis for ABF Freight's "bright line" position here is the contention that employers must be free not to employ dishonest people. While it is true as a general matter that the NLRA does not regulate employment decisions based upon motives not proscribed by the Act, here there *was* an illegally motivated discharge, and the issue is a remedial one only. This Court's opinion in *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393 (1983), establishes that where an employer discharges an employee for mixed legitimate and illegal reasons, the employer can escape the usual remedy only by bearing the burden of showing that the employer *would have—not could have—* discharged the employee without regard to the illicit motive. Here, the need for full remedy is more urgent, since the employee has already been absent from the workplace for some time because of a concededly illegal discharge, with the adverse requisite impact on employee rights of self-organization. No reason appears for imposing a *less* stringent burden on the employer here than in *Transportation Management,* and the employer in this case has made no attempt to meet that burden.

While the foregoing is sufficient to resolve this case, we note as well that the Board under the present circumstances requires that the employer bear the additional burden of demonstrating that the discriminatee is objectively unfit for his former position because of his post-discharge conduct—here, testifying untruthfully under oath. Given the significant differences between this situation and that in *Transportation Management,* that additional burden "effectuates the policies of this Act" and is therefore within the Board's remedial discretion.

ARGUMENT

The NLRA, as amended, makes it an unfair labor practice for an employer "by discrimination with regard to hire or tenure of employment to encourage or discourage membership in any labor organization" and, as well, for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." NLRA §§ 8(a)(3) & (4). 29 U.S.C. §§ 158(a)(3) & (4). The NLRA, additionally, directs that where such unfair labor practices occur, "the Board shall [issue] an order requiring [the employer] to take such affirmative action including reinstatement of employees, with or without back pay, as will effectuate the policies of this [Act]."

ABF Freight, the employer in this case, was found to have violated these provisions by discharging an employee because the employee had previously filed both Board charges and grievances under a collective bargaining agreement pertaining to his two earlier discharges.[1] In this Court, ABF Freight does *not* challenge the conclusion of the Board and of the Court of Appeals that the Act was indeed violated.

The question in this case, rather, is whether the National Labor Relations Board is, on some basis, *required* to deny reinstatement and backpay—otherwise the basic remedy deemed appropriate to "effectuate the policies of this subchapter" (NLRA § 10(c), 29 U.S.C. § 160(c)) where an employee is discharged in violation of §§ 8

[1] Because the employee in this case asserted rights under a collective bargaining agreement, his actions were protected by the NLRA, and therefore by § 8(a)(3). *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). The protection against retaliation contained in § 8(a)(4) is designed, of course, to safeguard the self-organization rights otherwise protected by the Act. Consequently, although the discharge in this case was not for the union organizing activity more traditionally at issue in discriminatory discharge cases, as such, it is subject to the same policy considerations applicable to such activity.

(a)(3) & (4)—whenever the discriminatee testifies untruthfully on the witness stand before the NLRB Administrative Law Judge ("ALJ"). The employer maintains that the NLRA mandates such a per se rule.

1. *Introduction*: To place this question in perspective, it is worth noting at the outset that the issue raised by this case will arise only where the employer, as here, has been found *guilty of an unfair labor practice*. In that circumstance, it will ordinarily be the case (again as here) that any testimony by a discriminatee that is deemed untruthful will *not* concern a central merits issue in the case; otherwise, once the employee's testimony concerning the relevant facts and circumstances surrounding the adverse employment action against him is disbelieved, the decision would be in favor of rather than against the employer.[2]

It is possible, of course, that an employee's untruthful testimony on a central merits issue could be believed by the ALJ and the NLRB and could therefore result in an unjustified finding of an unfair labor practice with reinstatement and backpay for the employee. But a remedial rule denying relief to *discovered* liars even where an unfair labor practice is found is unlikely to affect an employee who determines to lie in the hope that his or her lie will remain undiscovered and will result in a remedy running in his favor. A liar whose lie *is* material to the liability question always runs the risk that he or she will be found out, and that the employer will therefore prevail, with the necessary result that there will be no reinstatement and no backpay. Consequently, the only untruthful testimony that will be discouraged by the rule for which the employer argues is that concerning factual matters tangential to, rather than central to, the case; employees presumably will avoid such tangential lies in order to preserve entitlement to reinstatement and backpay in case the lies are discovered.

As the NLRB reports amply demonstrate, Labor Board cases often come down to findings on points on which there is conflicting testimony. And, as this case shows, in such cases the finding of an unfair labor practice frequently rests on adverse credibility determinations regarding the testimony of one or more witnesses for the *employer*, who are likely to be the employer's common law employees (if not statutory "employees" under NLRA § 2(3), 29 U.S.C. 152(3)).[3]

[2] Here, for example, the ALJ concluded that the discharged employee, Manso, did not tell his employer the truth about the reasons for his second lateness, and determined that Manso was therefore discharged for cause. Pet. App. B-59. The Board, however, found that Manso was not fired for dishonesty but for *lateness*. Pet. App. B-18. And, the Board went on to find that the reason for Manso's second lateness was simply irrelevant to the question whether his discharge was in violation of §§ 8(a)(3) & (4). The Board held that the employer's new, strict disciplinary policy for Manso's job classification only, mandating a discharge for a second unexcused lateness, could not serve as a neutral justification for the discharge, since the policy was supposed to apply only prospectively, yet was applied retroactively, and therefore disparately, to Manso. Pet. App. B-20.

[3] In this instance, the ALJ made findings, affirmed by the Board, that the employee, Manso, was telling the truth when he testified with great specificity to three incidents in which three different supervisory employees of the employer made statements to him, upon his reinstatement pursuant to an earlier grievance, to the effect that the employer would fire him again. Pet. App. B-46; Jt. App. 95-99. The three supervisory employees, however, each testified at the hearing and specifically denied, under oath, making such a statement. Jt. App. 56-57, 90-91, 118.

Similarly, the ALJ, with the Board's concurrence, found credible the testimony of a co-employee concerning an incident in which the co-employee requested permission to dial Manso a second time to see if Manso was available for work because he thought he had misdialed the first time, but was forbidden to do so by yet another supervisor, and forced to sign a form indicating that Manso was not available. Pet. App. B-47. Again, that supervisor, under oath, explicitly denied that the co-employee had expressed doubt about his dialing, or requested permission to redial. Jt. App. 62-64.

Finally, the ALJ also "flatly discredit[ed]" testimony by four other management employees concerning the employer's attitude concerning the new preferential casual system that gave rise to the

While not all adverse credibility determinations indicate that one of two disagreeing witnesses or the other is willfully lying (as opposed to simply incorrectly recollecting), in many instances it could be determined, were the question pursued, that the misstatement of fact was purposeful rather than accidental. Thus, in a substantial percentage of the instances in which employer unfair labor practices are found, *the witnesses for the employer willfully misstate the truth*, and do so in a material rather than tangential manner.[4]

In this light, it becomes apparent that petitioner's proffered broad, prophylactic rule favors material liars over tangential liars; liars for wrongdoers over liars who have not committed any unfair labor practice; and precautions against irrelevant distortions of the truth over enforcement of the statute's explicit prohibition on interference with collective activity generally and union organizing particularly.

As we show below, there is no basis in the NLRA itself, or in general principles applicable to the NLRB's proceedings, for limiting the Board's discretion to fashion reticulated, fine-tuned remedial principles intended to avoid such untoward results. As we also show, the principles applied by the Board to govern remedial issues in cases such as this are, if anything, more restrictive in

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present dispute, and noted as well that the employer's witnesses "took opposite positions on [one] point in the course of a five-minute colloquy." Pet. App. B-33.

In sum, *a total of at least eight of the employer's supervisory and managerial employees were found by the ALJ to be misstating the truth in their testimony under oath.*

[4] In this instance, there was no reason for the ALJ or the Board to make findings as to whether the discredited supervisory employees purposely lied, or simply innocently differed in their recollections from the General Counsel's witnesses; there are therefore no such findings. It seems unlikely, however, that the eight discredited supervisory employees—all apparently still employed by the employer at the time of the hearing—had similarly poor memories.

granting reinstatement and backpay than the pertinent statutory policies call for.

2. *Standards Governing the Board's Remedial Authority*: Section 10(c), 29 U.S.C. § 160(c)—the NLRA section governing the Board's remedial authority—has three notable features:

First, the broad directive to the Board is to "effectuate the policies of this [Act]." To apply this provision, then, it is necessary to have firmly in mind the pertinent policies of the NLRA, both generally and with regard to the particular unfair labor practices to be remedied. *Labor Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 265 (1938) ("upon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in light of its history, to ascertain its policy . . . to see whether [it] afford[s] a basis for its judgment that the action ordered is an appropriate means of carrying out that policy.")

Second, § 10(c) expressly provides for—although it does not mandate—reinstatement and backpay as appropriate remedies under the Act. Those remedies, as this Court's cases make clear, are made available not to vindicate the private interests of the discharged employees, but to implement the Act's public purposes, and their appropriateness under particular circumstances is to be judged accordingly.

Third, the NLRA's remedial provision is phrased in general terms, leaving to the Board broad discretion in determining the appropriate remedy from among those available.

Each of these aspects of § 10(c) is pertinent to this case.

(a) *Statutory Policies*: As this Court noted in the early days of the Act, Congress did not leave the Act's general policies to inference. Rather,

> Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ulti-

> mate concern . . . was "to eliminate the causes of certain substantial obstructions to the free flow of commerce." This vital national purpose was to be accomplished "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association." . . . [*Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 182 (1941).]

See also Virginia Electric & P. Co. v. Labor Board, 319 U.S. 533, 539 (1943); *Pennsylvania Greyhound Lines, supra*, 303 U.S. at 265-66, (the Act's "ruling purpose" is "to protect interstate commerce by securing to employees the rights . . . to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes.")[5]

Section 8(a)(3) implements that broad policy by "insulat[ing] employees' jobs from their organizational rights . . . allow[ing] employees to freely exercise their right to join unions, be good, bad, or indifferent members . . . without imperiling their livelihood." *Radio Officers' Union v. Labor Board*, 347 U.S. 17, 40 (1954). By

[5] The NLRA was, of course, amended in 1947 and 1959, with the addition of union unfair labor practices and some concomitant changes in the Act's underlying policies. *See, e.g.*, Labor-Management Relations Act, 61 Stat. 136, c. 120, Title I, § 101 (1947) (amending the "Finding and declaration of policy" provision of § 1 of the NLRA, 29 U.S.C. § 151). This case, however, and most others in which reinstatement and backpay for discriminatees are at stake, involve the employer unfair labor practices articulated in the original, 1935 Act and left substantially unchanged in the subsequent statutory revisions.

There was one 1947 amendment that the employer notes in passing and that is pertinent to this case: As amended, § 10(c) now provides that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." As we suggest later (at n.8, *infra*), however, that sentence supports rather than cuts against the Board's authority to order reinstatement and backpay in the present circumstances.

thus "protect[ing] employee self-organization and the process of collective bargaining from disruptive interferences by employers" (*American Ship Building Co. v. National Labor Relations Board*, 380 U.S. 300, 317 (1965)), the prohibition upon discriminatory treatment based on union or other collective activity prevents employer actions that "inevitably operate[] against the whole idea of the legitimacy of organization [and] . . . undermine[] the principle which, as we have seen, is recognized as basic to the attainment of industrial peace." *Phelps-Dodge Corp., supra*, 313 U.S. at 185; *see also id.* at 186 ("embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably, the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act.")

As a prohibition upon *discrimination* based on union activity, § 8(a)(3) necessarily limits an employer's prerogative to enforce otherwise legitimate employment-related rules, where the enforcement is intended to and "is likely to discourage participation in union activities." *Metropolitan Edison v. National Labor Relations Board*, 460 U.S. 693, 700 (1983). Thus, for example, "where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced." *American Ship Building Co., supra*, 380 U.S. at 312.[6] Similarly, an employer may refuse to reinstate

[6] Because "a finding of violation under [§ 8(a)(3)] will normally turn on the employer's motivation" (*American Ship Building Co., supra*, 380 U.S. at 311), the Board and this Court has developed a set of procedural rules for determining the motive question. *Metropolitan Edison Co., supra*, 460 U.S. at 701-02; *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 401-02 (1983). Since there is no question before the Court in this case concerning whether the employer in fact committed the unfair labor practice found, the precise manner in which anti-union animus must be proved in § 8(a)(3) cases is not an issue here.

striking employees in positions filled by permanent replacements and "might resort[] to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions after the strike" but may not purposely "discriminate against those most active in the union." *Labor Board v. Mackay Radio & Tele. Co.*, 304 U.S. 33, 347 (1938).

In short, the policy underlying § 8(a)(3) and related provisions is to provide assurance to employees generally that engaging in collective activity will *not* endanger their job security, so that they will feel free to engage in such activity. This assurance is necessarily provided to both model employees and less-than-perfect ones; otherwise—since most individuals are less-than-perfect—security in engaging in collective action could not be assured, and the Act's "ruling purpose" could not be achieved.

(b) *The reinstatement and backpay remedies*: Since the earliest days of the Act, this Court has also recognized that ordinarily, "complete relief" in a § 8(a)(3) case demands that "discrimination be neutralized by [the discriminatees] being given their former positions and reimbursed for the loss due to the lack of employment consequent upon the respondent's discrimination." *Mackay Radio & Tele. Co., supra*, 304 U.S. at 348. Reinstatement in particular is "the conventional correction for discriminatory discharges" (*Phelps Dodge Corp., supra*, 313 U.S. at 187) because it "require[s] the discrimination to cease not abstractly, but in the concrete victimizing instances. *Id.* at 188. As such, reinstatement (and backpay) are "means of removing or avoiding the consequences of a violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 236 (1938).

Although reinstatement and backpay, unlike many other NLRA remedies, flow to individual employees,

rather than to employees as a group, this Court has emphasized that the central function of that remedy is *not* "correction of private injuries" but " 'giv[ing] effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining.' " *Phelps Dodge, supra*, 313 U.S. at 193, *quoting National Licorice Co. v. Labor Board*, 309 U.S. 350, 362 (1940). Because "the central purpose of the Act [is] directed . . . toward achievement and maintenance of workers' self-organization" (*Phelps Dodge*, 313 U.S. at 193), the appropriateness of reinstatement and backpay must be judged against that public purpose, not against standards applicable when only " 'adjudication of private rights' " is at stake. *Id., quoting National Licorice Co., supra*, 309 U.S. at 602). *See also Shepard v. National Labor Relations Board*, 459 U.S. 344, 350 (1983); *Automobile Workers v. Russell*, 356 U.S. 634, 642-43 (1958); *Virginia Electric & P. Co., supra*, 319 U.S. at 549.

Phelps Dodge held, for example, that an employee who has suffered no economic loss due to a discriminatory discharge can still be eligible for reinstatement:

> [T]here are factors other than loss of wages to a particular worker to be considered . . . [T]o deny the Board the power to wipe out the prior discrimination by ordering the employment of such workers would sanction a most effective way of defeating the right of self-organization. . . . Again, without such a remedy industrial peace might be endangered because workers would be resentful of their inability to return to the jobs to which they may have been attached and from which they were wrongfully discharged. [313 U.S. at 193, 195.]

Thus, factors not directly related to making whole the particular employee whose discharge is being remedied are entitled to substantial weight in developing the principles governing reinstatement and backpay remedies under § 10(c). Those factors include: the effect denial

of reinstatement and backpay to one employee discharged for union activity may have in diminishing *other* employees' propensity to engage in protected activity in the future; the impact on future union activity when an employer successfully eliminates union activists and leaders from the workplace; and the need for a strong and consistent disincentive to employer discharges of employees for union activity, which purely prospective relief cannot supply.

(c) *Board Discretion Concerning Remedies*: The final critical feature of § 10(c) for purposes of this case is that because the Act does not create rights for individuals which "must be vindicated according to a rigid scheme of remedies [but] entrusts to an expert agency the maintenance of industrial peace" (*Phelps Dodge, supra,* 313 U.S. at 194), "Congress has delegated to the Board the power to determine when the policies of the Act would be effectuated by a particular remedy." *Shepard, supra,* 459 U.S. at 349.

As a consequence of this delegation,

> the relation of remedy to policy is *peculiarly* a matter for administrative competence[.] [C]ourts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. [*Phelps Dodge, supra,* 313 U.S. at 194, emphasis supplied.]

See also National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (emphasis supplied) (1969) (Board's "choice of remedy must be given *special* respect by reviewing courts"); *Shepard, supra,* 459 U.S. at 349.

The pertinent question, then, is whether there is anything "in the language or structure of the Act that requires the Board to reflexively [refuse to] order . . . 'complete relief' " (*Shepard,* 459 U.S. at 352) for illegally discharged employees because the employee does not tell the truth at a Board hearing, or whether, instead, "the Board acted within its authority in deciding that a [reinstatement and backpay] order in this case would . . . effectuate the policies of the act." *Id.*

3. *Petitioner's "Forfeiture" Rule*: Tested against the pertinent statutory policies, the public purpose of the Act's reinstatement and backpay remedies, and the broad discretion accorded the Board in "the relation of remedy to policy" (*Phelps Dodge, supra,* 313 U.S. at 194), ABF Freight's arguments (and those of its *amici curiae*) in support of the proposition that the Board can *never* reinstate with backpay an employee who testified falsely at a Board hearing border on the frivolous.[7]

There are two distinct strains to the argument of ABF Freight and its *amici curiae,* although on occasion the two are melded together. The first strain focuses on the Board's interest in its own processes, and maintains that reinstatement and backpay must be denied in a case like this to vindicate the interest in deterring untruthful testimony before the Board. The second line of argument focuses on the employer's own interests, and insists that because false testimony is a species of misconduct that *can* justify discharge, an employer who has violated the NLRA by discharging an employee for a different—*and unlawful*—reason should be able to resist reinstatement and backpay if the employee later gives false testimony in a Board proceeding.

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[7] The American Trucking Associations ("ATA") argues for a slightly less absolute rule—that the NLRB may not reinstate with backpay an employee who "testified falsely as to a *material* issue." Brief for the American Trucking Associations as Amicus Curiae ("ATA Br.) at (i) (emphasis supplied). ATA then goes on, however, to define a "material" issue to include questions whose answer in fact played no role in the ultimate determination, but *might* have been relevant had the Board taken a different view of the facts than it did. ATA Br. at 9. While that definition of "materiality" may, as ATA indicates, have some force in certain criminal contexts, it does not provide a basis for overturning the judgment below.

(a) *Vindication of Board Processes*: The employer's "abuse of the Board's processes" arguments proceed from the truism that the Labor Board, like other administrative agencies and courts, places an obligation on witnesses appearing before an ALJ to testify truthfully, by administering an oath prescribed by the Federal Rules of Evidence Rule 603 and otherwise. For a myriad of reasons, however, the general policy favoring truthtelling in administrative proceedings cannot alone supply the basis for denying a remedy otherwise appropriate to "effectuate the policies of [the NLRA]."

First, and most obviously, as this Court's cases make clear, the NLRA's "ruling purpose" (*Pennsylvania Greyhound Lines, supra*, 303 U.S. at 265-66) and "driving force" (*Phelps Dodge Corp., supra*, 313 U.S. at 186) is assuring industrial peace through protection of employee self-organization and collective bargaining. *See Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 13 (1940) (remedy improper under § 10(c) where the "order is not directed to the appropriate effectuating of the National Labor Relations Act, but to the effectuating of a distinct and broader policy . . . not the function of the Board.") And, for reasons we have already canvassed, reinstatement and backpay have long been recognized as essential to vindicating that true policy of the Act when an employee has been fired for engaging in activity protected by the statute. The fellow employees of an illegally discharged employee, for example, are likely to be aware of the circumstances of the discharge, but not of the proceedings before the Board; consequently, if the illegally discharged employee never returns to the workplace because of his actions at the hearing, the fear of discharge for union activities among other employees is likely to persist.[8]

[8] We note as well that § 10(c) does expressly preclude reinstatement and backpay in one instance—where the employee was discharged for cause. *See* n.5, *supra*; *see also Transportation Management Corp., supra*, 462 U.S. at 401. Since there is no similar barrier to reinstatement and backpay in the present circumstances,

Additionally, there is no reason to subordinate the Act's expressed policies, and to permit employers to succeed in removing union activists and other employees who engage in activity protected by the statute, when there are other, more traditional ways of vindicating the Board's interest in the accuracy of its own processes. The NLRA "is not a cause of action for perjury; we have other civil and criminal remedies for that." *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S. Ct. 2742, 2754 (1993). The function of the oath requirement upon which the employer relies is precisely to bring the witness within the coverage of those remedies.

Thus, it is simply untrue that unless the employer's absolute rule or a close variant thereof is adopted, "an employee appears to have nothing to lose by lying during unfair labor practice proceedings." ATA Br. at 10. *Cf. St. Mary's Honor Center, supra*, 113 S. Ct. at 2754 ("what an extraordinary notion, that we 'exempt [employers who give pretextual explanations of discharges] from responsibility for their lies' unless we enter . . . judgment for plaintiffs!")

Further, both witnesses for the General Counsel and witnesses for respondent are required to testify under oath. *There is no greater or less Board or public interest in having truthful testimony from one than from the other.*[9] As to respondents' witnesses (and General Counsel witnesses who are not themselves the illegally discharged employees), possible prosecution for perjury and concomitant

where the discharge was *not* for cause but for reasons proscribed by the Act, the fair inference is that the determination of the appropriate rule for circumstances in which a *post-discharge* basis for denying reinstatement is claimed is, like other aspects of the administration of remedies under the Act, left to the Board's sound discretion.

[9] As noted (n.3, *supra*), in this case, the ALJ and the Board concluded that except for his testimony concerning the reason for his lateness, the discharged employee was telling the truth; the ALJ and the Board, however, determined that *the employer's supervisory and management employees were, in general, not truthful.*

punishment is the *only* deterrent against rampant lying before the Labor Board. The employer's suggested absolute rule, then, "is not even a fair and even-handed punishment for vice, when one realizes how strangely selective it is." *St. Mary's Honor Center, supra,* 113 S. Ct. at 2754.[10]

It would be possible, of course, to devise an even-handed rule concerning lying before the NLRB. That would require adoption of the rule—in addition to the employer's proffered rule—that purposeful lying by respondent's witnesses automatically leads to reinstatement and backpay of the complaining employee, regardless whether he or she was in fact discriminatorily discharged. To state that possibility, however, is simply to underline why it is that the employer's proffered rule does not "effectuate the policies of the Act."

Obviously, it does not effectuate those purposes to grant reinstatement and backpay—or any other remedy—to an individual who was not in fact discriminated against in violation of the NLRA, because of behavior by the employer's agent that is independently illegal but *not* a violation of the NLRA. Cf. *St. Mary's Honor Center, supra,* at 2754-55. No reason appears why it any more effectuates the Act's policies to *deny* otherwise appropriate relief for such a reason.

Furthermore, denial of the usual reinstatement and backpay in order to vindicate the general public policy

[10] There is also the fact that the Board's processes would be greatly burdened were it necessary to determine the truthfulness of every statement, or even every potentially material but actually irrelevant statement, made by a witness before the Board as a precondition to determining the appropriate remedy. That is particularly so since, "there is no justification for assuming . . . that those [witnesses] who evidence is disbelieved are perjurers and liars." *St. Mary's Honor Center v. Hicks,* —— U.S. ——, 113 S. Ct. 2742, 2755 (1993). Consequently, there would need to be a determination in each instance concerning whether the misstatement was purposeful or not. *See* n.4, *supra.* The result could be a set of veritable perjury mini-trials as part of every Board proceeding.

favoring telling the truth would be punitive, as the employer's reference to the employee "forfeit[ing]" reinstatement and backpay indicates. The purpose of such a "forfeiture" would be to deter abuse of the Board's processes, not to remedy a violation of the Act. And, § 10(c)

> does not go so far as to confer a punitive jurisdiction. . . . The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. [*Consolidated Edison Co., supra,* 305 U.S. at 235-236.]

The employer's references to the equitable "clean hands" doctrine fares no better in supplying a rationale for the rule the employer supports. In its traditional formulation, the clean hands doctrine provides that:

> "whenever a party who as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him . . . the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." [*Keystone Driller Co. v. General Excavator Co.,* 290 U.S. 240, 245 (1933), *quoting* Pomeroy, *Equity Jurisprudence* (4th Ed.) § 307.]

For several reasons, this principle cannot supply the rationale for imposing a "forfeiture" of the Act's reinstatement and backpay remedy in order to vindicate the Board's interest in the integrity of its procedures.

Initially, this Court has stated emphatically that equity maxims are not to be imported into the NLRA by rote:

> [A] back pay order does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this [it] somewhat resemble[s] compensation for private injury, but it must constantly be remembered that [the] . . . remed[y is] created by statute . . . designed to

> aid the elimination of industrial conflict. [It] vindicate[s] public, not private rights. . . . For this reason it is . . . *wrong to fetter the Board's discretion by compelling it to observe conventional . . . chancery principles in fashioning such an order.* [*Virginia Electric & P. Co., supra,* 319 U.S. at 543 (emphasis supplied).]

See also Phelps Dodge Corp., supra, 313 U.S. at 188 (emphasis supplied) ("Attainment of a great national policy through expert administration in collaboration with limited judicial review *must not be confined within narrow cannons for equitable relief deemed suitable by chancellors in ordinary private controversies.*").[11] Indeed, the public nature of the Board's proceedings is reflected in their structure. In an unfair labor practice proceeding, the discharged employee is not the "party who as actor, seeks to set the judicial machinery in motion and obtain some remedy"—the General Counsel is, through the discretion-

[11] More generally, this Court, and the lower federal courts following this Court's lead, have declined to import both common law and equitable defenses into statutory schemes where to do so would not advance the purposes of the statute. Thus, *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968), declined to apply the common law *in pari delicto* doctrine to antitrust law, because even if

> [t]he plaintiff who reaps the reward of treble damages [is] no less morally reprehensible than the defendant . . . the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.

See also, A.C. Frost & Co. v. Coeur D'alene Mines Corp., 312 U.S. 38, 40 and 43-44, n.2 (1941); *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (9th Cir. 1979); *Lawler v. Gilliam*, 569 F.2d 1283 (4th Cir. 1978).

For reasons already canvassed, applying a "forfeiture" rule in the present circumstances would not advance the policies of the NLRA.

ary filing of a complaint.[12] *Vaca v. Sipes,* 386 U.S. 171, 182 (1967); *National Labor Relations Board v. Food & Commercial Workers Local 23 (Charley Bros.),* 484 U.S. 112 (1987).

Additionally, even if the clean hands doctrine applied here, it would not make mandatory denial of relief at a respondent's behest because of a possible adverse impact on the Board's processes. The clean hands doctrine is a principle "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." *Keystone Driller, supra,* 290 U.S. at 245-246. And, the doctrine "does not make the quality of suitors the test" or "apply . . . by way of punishment for extraneous transgressions." *Id.* at 245. Rather, the clean hands maxim justifies—but does not require—refusing to entertain a suit where the opposing party in the suit is actually injured by the offending party's behavior; "[t]he wrong must have been done to the defendant himself and not to some third party." Pomeroy, *Treatise on Equity Jurisprudence* (5th Ed. 1941) § 399; *see also id.* ("a wrong which has been righted may not be pleaded against a party to a suit in equity."); *Lawler, supra,* 569 F.2d at 1294 n.7. Here, the claimed injury—abuse of the Board's processes—is to the Board, not to the employer; and the employer was not in fact injured even indirectly, since the lie was found out and not relied upon in concluding that the employer violated the statute.

In sum, recognition of an absolute, mandatory defense to a reinstatement and backpay order for untruthful testimony by the discriminatee in order to preserve the integrity of the Board's own processes is consistent with neither NLRA § 10(c) nor any more general legal principles.[13]

[12] While the discharged employee *may* file the charge that triggers the General Counsel's investigation and determination whether to file a complaint, the NLRA permits such charges to be filed by anyone—a co-employee or a union, for example. NLRA § 10(b); NLRB Rules and Regulations, Subpart A, § 102.9.

[13] In certain, narrow circumstances, the NLRB takes the view that the traditional *backpay* remedy can be modified as a sanction

(b) *Preservation of Management Rights*: (i) *The nondiscrimination standard*: The other strain of the employer's argument relies upon its management interest in assuring the honesty of its employees. The contention is that since dishonesty, including lying under oath, *could*

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for gross abuse of the Board's processes. *See, e.g., American Navigation Co.*, 268 NLRB 426, 428 (1983) (where a discriminatee conceals interim employment in a backpay proceeding, the Board will deny backpay for the entire quarter in which concealed employment occurred but no longer, in order to "discourage claimants from abusing the Board's processes and . . . also deter respondents from committing future unfair labor practices); *Lear Siegler Management Service Corp.*, 306 NLRB No. 84 (1992) (where a discriminatee threatens a witness in a Board proceeding in order to induce the witness to testify in a certain way, backpay will be tolled as of the date of the threat in order to "protect[] the integrity of the Board's processes . . . [while] ensur[ing] that a respondent's unlawful discrimination does not go unremedied.")

The Board will not, however, deny *reinstatement* in order to vindicate the Board's interest in the integrity of its processes. *Id.* ("interference with the Board's process . . . does not alone warrant the denial of reinstatement," although the same behavior that constitutes interference could also be evidence of unfitness as an employee and warrant denial of reinstatement for that reason).

We doubt that even the Board's limited forfeiture of backpay rule can be squared with § 10(c). In particular, protection of the Board's processes is a means, not an end, under the NLRA, and cannot fairly be termed an "equally important" policy of the Act (*Lear Siegler, supra*, slip op. at 2) with remedying unfair labor practices. The punitive forfeiture of backpay is not necessary to protect the integrity of the Board's processes, since other civil and criminal remedies are available; and forfeiture of backpay serves its purported purpose selectively and inadequately, since employers and third-party witnesses may also seek to abuse the Board's processes but, because they are not eligible for backpay, cannot be punished by its denial.

Be that as it may, because the employer is arguing only for an absolute, bright-line rule and does not seek to come under the Board's standards governing denial of backpay to vindicate Board processes, the Court can leave to another day the question whether the Board's current *American Navigation/Lear Siegler* approach is consistent with the Act.

be a ground for discharge absent antiunion animus, an employer should be free of all reinstatement and backpay obligations to a "lying" discriminatee. Brief for Petitioner at 18-19, 30-34; ATA Br. at 12-14.[14] The proposition, as posited, cannot be squared either with the basic discrimination standard of NLRA §§ 8(a)(3) & (4) or with this Court's decision in *Transportation Management Corp., supra.*

It is true, of course, that the NLRA "permits a discharge for any reason other than union activity or agitation for collective bargaining with employees [or retaliation for invoking the Board's processes]." *Associated Press v. Labor Board*, 301 U.S. 103, 132 (1937). But §§ 8(a)(3) and (4) proscribe *discrimination* against employees based upon union activity. This standard, as noted previously, protects both less-than-perfect employees—*viz.*, those who "have broken a shop rule" (*American Ship Building Co., supra*, 380 U.S. at 312)—and those model employees who have not done so. Indeed, the need to prohibit uneven enforcement of "shop rules" against union adherents and activists is what § 8(a)(3) is all about. Thus, the fact that a particular post-discharge action by an employee *could* have justified discharge under a particular employer's "shop rules" certainly does not indicate that the employee *would* actually have been discharged for that reason had he or she still been employed, or that, if he or she was so discharged, the "shop rule" rather than a continuation of the original antiunion or retaliatory motive would have been the reason.

It is also to the point that, in this case, and other like cases, it has already been determined that "[t]he employer is a wrongdoer; he has acted out of a motive that is declared

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[14] This strain of petitioner's argument would apply equally to any species of employee conduct occurring after an illegal discharge that an employer claims would justify discharge had it occurred while the individual was still employed.

illegitimate by the statute." *Transportation Management Corp., supra,* 462 U.S. at 403. And, as we have seen, the "policies of the [Act]" support reinstatement and backpay in order to neutralize the effect of the illegal discriminatory discharge on the workplace as a whole (as well as on the discriminatee), and to deter future employer actions intended to interfere with collective activity or resort to the Board's processes.

The force of this point is redoubled by the further fact that it is the employer's own illegal behavior that has created a situation in which the employee was in fact *not* working at the time of his or her infraction of the employer's rules. Under these circumstances, judgments about whether the infraction would have led to discharge had the employee been at work at the time, and whether that discharge had it occurred would have been due to union activity or the even-handed enforcement of shop rules becomes one that is *doubly* hypothetical, and therefore doubly difficult to decide accurately.

Against this background, the question then becomes under what circumstances the usual remedy for the employer's illegal actions, with its salutary effect of reversing to some degree the adverse impact of the earlier discharges on employee self-organization and assertion of rights under the Act, *must* yield to the employer's proffered management interests in enforcing "shop rules". This Court's opinion in *Transportation Management Corp., supra,* and the underlying Board cases (*e.g., Wright Line,* 251 NLRB 1083 (1982)) provides an initial answer to that question (although, for reasons discussed below, the present circumstances are sufficiently different to justify the Board's rule that an *additional* evidentiary burden, not imposed by the *Wright Line* cases, also be placed upon employers resisting reinstatement and back pay).

Transportation Management involved the situation in which the employer's reasons for the *original* discharge

involved *both* antiunion animus and considerations not proscribed by the Act. Under those circumstances, this Court held, the Board is justified in concluding, first, that "to establish an unfair labor practice the General Counsel need show . . . only that a discharge is in any way motivated by a desire to frustrate union activity" (462 U.S. at 399), and, second, that the employer cannot avoid remedying the illegally motivated discharge with reinstatement and backpay unless the employer carriers the "burden [of] . . . prov[ing] that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons." *Id.* at 401.[15]

No reason appears why the employer in the present circumstances should carry any *less* burden to justify a refusal fully to "neutralize" the impact of its illegal behavior. Here, the *original* discharge indisputably would *not* have occurred absent an illegal motive, and the discharged employee was therefore definitely out of the workplace, and suffering economic losses, for a period of time because of a violation of the Act, with the same impact upon employee self-organization and assertion of protected NLRA rights as if the post-discharge infraction (if such it is) had not occurred. In a *Transportation Management* situation, on the other hand, it is unclear whether or not there would have been *any impact at all* on the employee or on the workplace due to the employer's illegal motive, since the very same adverse consequences may well have ensued in any case.

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[15] The Board rule reviewed in *Transportation Management* declines to find any violation of the Act at all where the employer succeeds in making out the required affirmative defense. This Court, however, expressly noted that

> the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer. [462 U.S. at 402.]

Moreover, as in *Transportation Management,* "[i]t is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by [its] own wrongdoing." 462 U.S. at 403. Indeed, the risk of uncertainty problem is considerably more pronounced in cases like this one than in *Transportation Management*: The hypothetical factual issue in *Transportation Management* involved not what the employer did and under what circumstances but why. The very concreteness of the circumstances of an actual discharge aids in drawing inferences concerning likely motivation. Here, in contrast, because of the employer's illegal acts it is impossible to establish *other than entirely hypothetically* whether the employee would have been discharged at all at some point after the original, illegal discharge, and whether, if so, the hypothetical discharge would have been legally or illegally motivated.[16]

[16] While the Board has at times been less than precise on this point, we read the Board's most recent cases as applying the *Transportation Management* approach as part, but not all, of the employer's burden in justifying refusing reinstatement and backpay because of employee behavior occurring after the original discharge. *See Owens Illinois Inc.*, 290 NLRB 1193 (1988), *enforced without opinion*, 872 F.2d 413 (3rd Cir. 1989) (fact that employer did not discharge officials who testified falsely indicates that the employer could not meet its burden of proof because it cannot show that the employee would not have been retained due to his false testimony).

We note, although the issue is not directly related to this case, that the Board has not consistently applied precisely the *Wright Line* approach to situations related to but different from those before the Court, for reasons that are unclear.

For example, where an employer's original discharge would not have occurred but for illegal motives, yet facts turn up during the course of the unfair labor practice adjudication that might have justified the original discharge had the employer known of them, the Board does place the burden of proof on the employer to establish the facts that justify denial of back pay and reinstatement. *John Cuneo, Inc.*, 298 NLRB 856 (1990). That burden, however, seems to be somewhat less than the one imposed in the *Wright Line* cases, since the employer need not show that the employee *would* have been discharged for proper reasons, but only that "the discriminatee's conduct would have *provided grounds* for termination based on a preexisting lawfully applied company policy." *John Cuneo, Inc.*, 298 NLRB at 857 n.7 (emphasis supplied); *see also id.* at 856 (emphasis supplied) (sufficient that "the Respondent *probably would not have retained* [the employee] after it learned of his misstatement.")

After-acquired evidence situations involve facts that in many instances would not have been uncovered at all by the employer but for its illegal activity and the ensuing unfair labor practice proceedings. Consequently, permitting reliance on after-acquired evidence as a basis for denying reinstatement and backpay carries a grave likelihood of undermining the policies of the Act. Both the discharged employee and co-employees could see the ultimate exclusion from the workplace as in some sense "caused" by the illegal activity, leading to an unwillingness to engage in such activity in the future. And the disincentive to committing unfair labor practices is to some extent diluted where the employer may be able to escape the costs of doing so by combing the employee's record for previously undiscovered infractions. One would think, consequently, that the employer's burden would be greater, not less, in those cases than where, as in *Transportation Management*, the employer's legitimate motivation was known at the time of the discharge.

[17] The employer's reliance upon the "could have fired" approach is understandable, since it entirely failed to meet any burden of proof as to what it would have done and why. Thus, as in *Owens Illinois*, the employer in this case entirely failed to present *any* facts indicating that it would have discharged Manso for false testimony alone, even if Manso had *not* invoked the Board processes in the first place and was testifying for the employer rather than against it. And, as in *Owens Illinois*, it does not appear that the employer could have met its burden had it tried to do so, since eight different management representatives were also determined to have

Thus, the employer's assertion that it can resist reinstatement and backpay simply because dishonesty *can* justify discharge, without meeting the burden of at least demonstrating that the employer would *have* discharged Manso for his untruthful testimony without regard to his protected activity, must fail at the threshold, as inconsistent with *Transportation Management.*[17]

(ii) *The Board's two-pronged approach*: The NLRB has not regarded the *Transportation Management* hypothetical non-discrimination standard as sufficient to "effectuate the policies of the Act" where the employee was in fact discharged for illegal reasons and was out of the workplace as a result during the time that the asserted new grounds for discharge occurred. Rather, the Board has maintained consistently that

> [w]hile seeking to be excused from his obligation to reinstate or to pay backpay [for reasons] . . . not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant. [*O'Daniel Oldsmobile*, 179 NLRB 398, 405 (1969)].

See also, e.g., Mandarin, 228 NLRB 930, 931-32 (1977); *Owens Illinois, supra*, 290 NLRB at 1193; *Service Garage, Inc.*, 256 NLRB 931 (1981), *enforcement denied on other grounds*, 668 F.2d 247 (6th Cir. 1982). In applying this standard, the Board looks to the particular job previously held by the employee and to other circumstances, and determines whether or not the nature of the post-discharge infraction would render the employee objectively unfit for the position.

Since the employer's position in this case with regard to its purported management prerogatives justification is inconsistent with *Transportation Management*, and because the employer failed to meet its burden under *Transportation Management*, the further question whether the second, objective unfitness standard applied by the Board is consistent with § 10(c) is not directly presented. Were the Court nonetheless to reach that question, however, it should uphold the Board's two-pronged standard as within

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testified falsely and "there is no indication that the Respondent took any action against these officials." 290 NLRB at 1194.

the broad discretion of the Board with regard to "the relation of remedy to policy." *Phelps Dodge, supra*, 313 U.S. at 194.

As noted above, this species of case differs from *Transportation Management* in several critical respects, all of which support the "unfitness" prong of the Board's test:

First, the discriminatee has been absent from the workplace for some period of time because of the employer's illegal discharge, with the concomitant interference with the assertion of protected rights by the discriminatee *and* by co-employees. "Denial of the normal remedy leaves the effects of the Respondent's unlawful conduct unremedied and thus, fails to effectuate the policies of the Act." *Owens Illinois, supra*, 290 NLRB at 1193.

Second, since the employer in the current circumstances has already caused some of the harms against which NLRA §§ 8(a)(3) & (4) are directed, it is sensible to conclude that those harms should be remedied as usual absent some *overriding* reason. The employer's *usual* management prerogatives, exercised through nondiscriminatory application of workplace rules, applicable when there has been no illegal activity, do not alone supply that reason where the employer has already acted in an unlawful manner threatening the Act's policies.

Third, the task of proving what would have happened but for the employer's illegal action is vastly complicated by the fact that no actual second discharge occurred; the employer can therefore often make representations regarding what would have happened that cannot be tested against the facts of an actual occurrence. Again, requiring the employer to prove the employees objectively unfit demands that the employer make a demonstration relating to present, real circumstances, and provides a useful safeguard against self-serving, unverifiable testimony.

Fourth and finally, where, as here, the asserted infraction relates to testimony in a Board proceeding against the employer's interests, there is the additional factor that the right to give such testimony is itself affirmatively protected by § 8(a)(4), so that a Board-administered check on the employer's own standards is justified in order to separate protected from unprotected activity as a basis for adverse employer action, and to avoid a chill on protected activity. Cf. *Linn v. Plant Guard Workers*, 383 U.S. 53, 64-65 (1966).

The Board's two-prong standard for cases concerning asserted post-discharge infractions by discriminatees therefore "effectuates the policies of the Act," by assuring a meaningful remedy for adjudicated unfair labor practices except where the strongest countervailing considerations are present. That the employer's position in this case seeks to upset that standard without justification is yet another reason the employer cannot prevail.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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